91-1344

Supreme Court, U.S.
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No. 91-____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

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KATHRYN A. KIDWELL; MICHAEL S. COFFMAN;
HELEN EADES; RAMONA J. ELLIS,

*Petitioners*,

v.

TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION, *et al.*,

*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI

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February 1992

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## QUESTIONS PRESENTED

I. Does a labor organization, granted powers of "exclusive representation" by the Railway Labor Act over employees' wages, hours and working conditions, exceed that granted authority and violate its duty of fair representation and/or the First and Fifth Amendments when it uses that authority to require represented employees to choose between:

A. full participation in the collective bargaining process and ratification of the negotiated agreement, which is limited to only members of the organization, at the cost of subsidizing the organization's political, ideological and other noncollective bargaining activities with which they disagree; or

B. freedom from subsidizing the organization's political, ideological and other noncollective bargaining activities, which is limited to nonmembers of the organization, at the cost of forfeiting all participation in the collective bargaining process and ratification of the negotiated agreement?

II. When deciding whether plaintiffs are adequate class representatives, may a court, consistent with the limitations imposed by the First Amendment and Rule 23 of the Federal Rules of Civil Procedure, consider the presumed political and ideological goals of a bona fide, nonprofit, IRS-approved, independent, public interest legal assistance organization, specifically the National Right to Work Legal Defense and Education Foundation, Inc., with which plaintiffs have associated and secured free legal assistance to obtain meaningful access to the courts; and then declare that plaintiffs are **not** adequate class representatives, thereby denying the putative class meaningful access to the courts, because of plaintiffs' association with, and the court's predilection against, the presumed political and ideological goals of the Foundation's expressive litigation program?

## PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, parties to the proceedings below included the Transportation Communications International Union, Con-Rail System Board of Adjustment No. 86 and Transportation Communications International Union, Seaboard System Board of Adjustment No. 3, as respondents.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioners Kathryn A. Kidwell, Michael S. Coffman, Helen Eades and Ramona J. Ellis respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered on October 3, 1991.

## OPINIONS BELOW

The opinion of the court of appeals (Appendix ("App.") A, *infra* 1a) is reported at 946 F.2d 283. The opinion of the United States District Court for the District of Maryland (App. B, *infra* 45a) is reported at 731 F. Supp. 192. Its unreported judgment is reproduced as Appendix C, *infra* 72a. Its unreported memorandum and order granting, in part, petitioners' motion to alter or amend the judgment and denying respondents' motion to alter or amend the judgment is reproduced as Appendix D, *infra* 73a. Its unreported order and amended judgment is reproduced as Appendix E, *infra* 81a.

## JURISDICTION

The judgment of the court of appeals was entered on October 3, 1991. A timely petition for rehearing was denied on November 21, 1991 (App. F, *infra* 83a).[1] This petition is filed within ninety (90) days of that date. *See* Supreme Court Rule 13.4. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (West Supp. 1991).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**The First Amendment to the United States Constitution** states in pertinent part:

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[1] At the same time, the court voted 6-5 to deny rehearing in banc (App. F, *infra* 83a). (Circuit Judges Russell, Widener, Wilkinson, Wilkins and Hamilton voted to rehear the case in banc; Chief Judge Ervin and Circuit Judges Hall, Phillips, Murnaghan, Sprouse and Luttig voted against rehearing in banc. Circuit Judge Niemeyer, who as a District Court Judge and as a Circuit Judge sitting by designation decided the case in the District Court, recused himself. Circuit Judges Russell and Widener also dissented, without opinion, from the denial of rehearing in banc.)

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**The Fifth Amendment to the United States Constitution** states in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

**Section 2, Eleventh of the Railway Labor Act** (45 U.S.C. § 152, Eleventh (1986)) states in pertinent part:

> Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—
>
> > (a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

## STATEMENT OF THE CASE

Petitioners ("employees") are four current and former railroad employees. Petitioner Kidwell is a member of the union, while petitioner Eades was a union member until she retired in 1988. Petitioners Coffman and Ellis are not members of the union. App. A at 2a-3a.

The Transportation Communications International Union[2] and two of its affiliates (collectively "TCU" or "the union") are the exclusive collective bargaining representative of the employees under the Railway Labor Act ("RLA"), 45 U.S.C. § 152. Union security provisions in collective bargaining agreements between TCU and employers require **all employees**, union members and nonmembers alike, as a condition of employment, to divert to the union that part of their wages equal to the union's dues, initiation fees and assessments. App. A at 2a-3a.

Since 1985, petitioners and thousands of other TCU-represented employees have objected to the union's political, ideological and other nonrepresentational expenditures and have requested a rebate of or reduction in the amount of union dues or fees spent on such nonbargaining purposes. App. B at 47a; District Court Record ("R.") 42 at 16. On October 6, 1985, with legal assistance provided by the National Right to Work Legal Defense and Education Foundation, Inc.,[3] the employees as

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[2] Formerly the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees ("BRAC" or "Railway Clerks").

[3] The Foundation is a bona fide, nonprofit, IRS—approved, independent, public interest legal aid organization engaged in First Amendment-protected expressive litigation programs which provides its legal assistance through staff attorneys and outside counsel. *UAW v. National Right to Work Legal Defense & Educ. Found.*, 781 F.2d 928, 934-35 (D.C. Cir. 1986); *National Right to Work Legal Defense & Educ. Found. v. United States*, 487 F. Supp. 801, 802-03, 806-08 (E.D.N.C. 1979). Since 1977, the Foundation has provided legal assistance in each of the Supreme Court cases establishing the statutory and constitutional

putative class representatives filed a class action suit against TCU, alleging violations of the First and Fifth Amendments, § 2, Eleventh of the RLA, and the union's duty of far representation.[4] R.1; R.16 at 3, 19. The initial complaint requested declaratory, monetary and injunctive relief on the grounds that: a) the union's method for collecting and reducing dues for union member employees and fees for nonmember employees lacked the procedural safeguards required by this Court and; b) the amount of the required dues/fees exceeds the amount permitted by the RLA and First Amendment. App. A at 4a.

The union's response to these statutory and constitutional requirements began twenty-five years ago when, in reaction to this Court's decisions against TCU in *Machinists v. Street*, 367 U.S. 740 (1961) and *Railway Clerks v. Allen*, 373 U.S. 113 (1963), TCU adopted procedures that allowed **both** union member and nonmember employees to object to and not fund the union's political agenda. R.1 at 9-10; R.4 at 4. However, three years after this suit was filed, and two years after the procedures established by this Court in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986) enhanced the procedural protections essential to employees' rights, TCU abruptly changed its objection policy so that **only** nonmember employees could object. App. A at 4a.

Kidwell and other union member employees who objected in January 1989 were informed that only by relinquishing their union membership could they continue to object and not fund the union's political and ideological agenda. But they were warned by TCU that if they did resign from the union to preserve their

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rights of dissenting employees not to financially support their union's political and ideological activities. *Lehnert v. Ferris Faculty Ass'n*, ___ U.S. ___, 111 S. Ct. 1950 (1991); *Communications Workers v. Beck*, 487 U.S. 735 (1988); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

[4] Federal jurisdiction is based on 28 U.S.C. §§ 1331 and 1337(a) (West Supp. 1991).

political independence, they would forfeit the **rights they had as *members*** to fully participate in the union's collective bargaining process and vote on the ratification of the bargaining agreement which vitally affects their working lives. App. G at 85a. Shortly thereafter, the employees filed an amended class action complaint to add, among other things, a challenge to TCU's then-recent exclusion of both union member employees from its objection policy and nonmember employees from equal participation in the collective bargaining process. App. B at 46a; R.42 at 27-34.

Ruling on cross-motions for summary judgment, the district court on February 27, 1990, held that TCU's use of union members' dues over their objections for political, ideological and other nonbargaining purposes improperly infringes on their statutory and First Amendment rights. The decisive factor in the court's ruling was that TCU had presented employees with an illegal dilemma when the union limited the objection policy to only nonmembers who, unlike union members, are denied the right to full and equal participation in the collective bargaining process, which, because of the RLA's principle of exclusive representation, vitally affects the working lives of union members and nonmembers alike. App. B at 46a-56a.

The illegal dilemma thus presented employees with the choice of **either** joining the union and being required to support the political, ideological and other nonbargaining causes to which they are opposed **or** withdrawing from the union to preserve their statutory and constitutional rights, but foregoing the rights TCU had given union members to directly and individually participate in shaping the terms and conditions of their employment. In other words, they are given the option of **either** protecting free speech **or** protecting their vote on continuing in or conditions of their work. App. B at 47a, 53a-56a.

Based on decisions of this Court that include union members among the employees given the right to object and receive dues

reductions,[5] the district court ordered TCU to provide Kidwell and other union member employees the right to object and receive a dues reduction to the same extent and in the same manner as nonunion employees.[6] App. B at 50a-56a, 71a.

TCU filed a timely motion to alter or amend the judgment which stated that the union must permit objecting union member employees to pay reduced dues on the same basis as nonunion employees. App. D at 73a. On October 19, 1990, the district court denied the motion and reaffirmed its original judgment protecting a union member's right to object. App. D at 74a-77a. The court noted that its original holding was supported by the intervening decision of this Court in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 665 (1990), which determined that "union members who disagree with a union's political activities need not give up full membership in the organization to avoid supporting its political activities."

Further describing the effect of the illegal dilemma TCU offers employees discussed in its original decision, the court concluded:

> A proper reading of *Austin* reveals that it does not stand for the proposition, argued by the Union, that Kidwell's RLA and Constitutional rights are satisfied by the fact that she may simply resign from the Union, without fear of losing her job, if she wishes to object to the expenditure of her exacted fees for purposes not related to collective bargaining. The economic disincen-

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[5] *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Machinists v. Street*, 367 U.S. 740 (1961).

[6] The district court rejected, either on the merits or as moot, most of the remaining claims challenging the method or procedure TCU used to account for and return the dues/fees attributable to nonbargaining expenditures. App. B at 46a, 56a-71a. However, the court did find that the previous requirements of using individual envelopes and certified mail unduly burdened the exercise of employees' statutory and constitutional rights. App. B at 67a-68a.

> tives recognized in *Austin* are similar to those felt by Kidwell and other union members. **Actual membership in the Union under a union security agreement is not "voluntary" because strong economic disincentives exist for withdrawing as a member.** By resigning from the union, employees surrender the ability to participate in shaping the terms and conditions of their employment.

App. D at 74a (emphasis added).

The employees also timely moved to alter or amend the judgment because the district court had not explicitly ruled on their pending request for certification of a class of all objectors, union member and nonmember alike. App. D at 73a-74a, 77a. The renewed request for class certification requested certification of several subclasses based on the court's determination of illegal restrictions in the union's objection policy. The subclasses included: a) union member employees whose objections were rejected because TCU is only honoring objections sent by nonmembers and b) union member and nonmember employees whose objections were rejected because TCU was only honoring objections sent in a separate envelope and by certified mail.[7] App. D at 77a.

The district court refused to certify the broad class of **all** objecting employees because it considered a future class too indefinite for certification. In addition, the court felt the named plaintiffs' factual circumstances were not representative or even typical of the putative class because the plaintiffs had received the reductions they requested, while some objecting class members had not received the requested reductions. App. A at 41a-42a; App. D at 78a.

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[7] During the period in which TCU utilized the illegal technical requirements, one-third of the potential class members had to pay for the union's objectionable political and ideological agenda because their objections, although received and noted by TCU, were rejected on these technical grounds. R.16 at 10 n.8.

Despite these minor reservations, the court did certify the union member subclass "to give effect to its ruling" on the rights of union members to object. However, other than its general comments concerning why it was not certifying the complete class, the court was silent on why it did not also certify the other subclass[8] "to give effect to its [other] ruling" that TCU's separate envelope mailings and certified mail requirements constituted illegal burdens on the right to object. App. D at 78a.

Nowhere did the district court make any reference to the Foundation, nor did it make any direct finding that any potential differences in the motivations for objecting existed between the putative class representatives and the rejected subclass that would create a serious conflict of interest and preclude class representatives from adequately representing the subclass.[9] App. D; App. E.

Both TCU and the employees filed timely appeals. TCU appealed only from the district court's judgment giving union member employees the same right to object and receive a dues reduction as afforded nonunion employees. The employees appealed from, among others, the district court's refusal to certify a subclass of objecting employees denied rebates for failing to comply with TCU's illegal technical objection requirements. App. A at 2a, 6a, 41a.

The Fourth Circuit reversed the district court's judgment granting union members the right to object and pay less than full

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[8] The proposed subclass consists of those employees whose objections were denied for failing to comply with certain technical objection requirements the district court found illegal. TCU did not appeal the court's rejection of these technical requirements.

[9] It is hard to see how the district court could have held any negative thoughts on the Foundation's expressive litigation or the employees' association with the Foundation when the court accepted Kidwell as the class representative for a subclass of union members, and the undersigned counsel, a staff attorney with the Foundation, as suitable class counsel.

dues but affirmed its disposition on all issues presented by the employees, including its denial of certification of the subclass. App. A at 2a.

Although the panel "recognize[d] that the position urged by Kidwell and adopted by the district judge is not without its appeal," it concluded "that neither the RLA nor the First Amendment confers on a union member employee the right to associate as a member with the union serving as the collective bargaining representative yet pay only for the costs of union activities related to collective bargaining."[10] App. A at 6a-7a.

The panel reversed because it presumed that in an agency shop,[11] where there is **no employer enforceable** condition of employment which requires employees to either become **full** union members or pay **full** dues, joining the union is a legally voluntary act, regardless of what benefits and favoritism the union may give to union member employees and withhold from nonmember employees in exercising its RLA-mandated exclusive representational functions. App. A at 18a, 27a, 31a-34a. The district court, however, focused on the **union's role** in discriminating between union member employees and nonmember employees by allowing its members greater participation in its RLA-mandated activities than it allows nonmember employees.

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[10] Despite the reliance of the district court on decisions of this Court from *Street* to *Austin*, the court of appeals felt "that the Supreme Court has never confronted or answered the question Kidwell and the union pose." App. A at 7a.

[11] Under an agency shop requirement employees do not have to become formal members of the union to comply with the union security requirement. Instead, they must pay agency fees to support those union activities germane to collective bargaining, contract administration and grievance adjustment. *Ellis*, 466 U.S. at 439. The panel thought that because some of the earlier Supreme Court cases involving union members arose from a union shop requirement in which employees were purportedly required to become formal members of the union to comply with the agreement, that the right for a union member to object, if it exists at all, is limited to "illegal" union shop requirements, not to agency shop requirements. App. A at 14a-17a.

It found that joining the union under such circumstances is not, as a matter of law, a voluntary act, regardless of the lack of any employer enforced condition of employment. App. B at 53a-56a; App. D at 74a-75a.

The panel affirmed the district court's refusal to certify a subclass of objectors who had failed to comply with TCU's illegal technical objection requirements, and thus were denied dues reductions. The panel based its affirmance on the ground—which had not even been argued[12]—that the putative class representatives were associated with and were being provided legal assistance by the Foundation.[13] The panel speculated that the nature of the Foundation's expressive litigation program "is consistent with—and only with—the aims of . . . the employee who is hostile to unions on political or ideological grounds [and] . . . wants to weaken and if possible destroy the union." Based on no record evidence of any kind concerning either the Foundation or any differences between the motives of the putative class representatives and the putative subclass, but instead on its perceived notion of the political and ideological content of the Foundation's litigation program, the panel found class certification dangerous and held: a) plaintiffs represented by the Foundation are not adequate class representatives; and b) the Foundation itself is not an adequate litigation representative.[14] App. A at 43a-44a.

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[12] While presenting numerous arguments to support the district court's denial of certification of the subclass, TCU made no direct arguments to the court of appeals regarding the Foundation. Moreover, TCU did not appeal the certification of a subclass of union **members** represented by the same class representative and class counsel that the panel found politically inappropriate to represent another subclass of objecting employees.

[13] *See* note 3, *supra*.

[14] The panel erroneously surmised that the Foundation itself was either the class representative, instead of Kathryn Kidwell, et al., or class counsel, instead of Attorney Milton L. Chappell.

The employees filed a timely petition for rehearing with suggestion for rehearing in banc on both questions presented here. On November 21, 1991, by a 6-5 vote,[15] (Judge Niemeyer, author of the district court decisions having recused himself), the Fourth Circuit, with two judges dissenting without opinion, denied the rehearing in banc. The original panel denied the petition for rehearing. App. F at 84a.

## REASONS FOR GRANTING THE WRIT

### I. THE QUESTIONS PRESENTED BY THIS CASE SHOULD BE SETTLED BY THIS COURT BECAUSE OF THE EXCEPTIONAL IMPORTANCE OF PROTECTING FIRST AMENDMENT FREEDOMS OF FREE ASSOCIATION AND SPEECH

Throughout a consistent line of decisions spanning the last thirty years this Court has held that the RLA and other labor statutes, by not authorizing a union to use dues to support political, ideological and other nonbargaining causes, prohibit it from doing so over the objection of represented employees.[16] There has been no indication that union members could be treated differently from nonunion employees with respect to exercising the right to object to the political, ideological and other nonbargaining expenditures of dues exacted pursuant to a union security or agency shop clause when membership in the union is either required by the employer or the union to protect

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[15] *See* note 1, *supra*.

[16] Specifically, the panel's decision directly conflicts with this Court's decisions in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 665-66, 676-77 & n.8 (1990); *Ellis v. Railway Clerks*, 466 U.S. 435, 439 & nn. 2-3, 459 (1984); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 212-13 & n.2, 217 n.10, 218 n.12, 227 & n.23, 231-32, 234-35 (1977); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 196 n.36 (1967); and *Machinists v. Street*, 367 U.S. 740, 750, 764, 768-70, 777-78 (1961).

the right to work or the ability to participate in shaping the terms and conditions of employment.

Over a similar period of time this Court has consistently held that the First Amendment protects both association for expressive litigation and the political and expressive nature of litigation itself.[17] Since the enforcement of "constitutional rights through litigation, **as a matter of law**, cannot be deemed **malicious**," *Button*, 371 U.S. at 440 (emphasis added), the association with and political views of charitable legal assistance organizations that support litigation as a form of First Amendment-protected expression can never be a factor in deciding whether to certify a class.

The first question is important due to the millions of union member employees whose statutory and First Amendment freedoms not to be compelled to support the unions' political, ideological and other nonbargaining causes are burdened by applicable union security requirements and the strong economic disincentives unions impose on withdrawing from the union. The second question is important because of the thousands of people associating with and being represented by the hundreds of independent, public interest legal organizations engaged in expressive litigation programs who will be denied class certification on the basis of the court's own personal animosity towards the political nature of such public interest litigation programs.

Moreover, this case is particularly important for reasons other than the number of individuals affected. Freedoms guaranteed by the First Amendment are "rights which we value most highly and which are essential to the workings of a free society." *Speiser v. Randall*, 357 U.S. 513, 521 (1958). Both questions present important First Amendment issues critical to the workings of a free society. This has been shown by the

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[17] *Lehnert v. Ferris Faculty Ass'n*, 111 S. Ct. 1950, 1963 (1991); *In re Primus*, 436 U.S. 412, 426-32 (1978); *Railroad Trainmen v. Virginia Bar*, 377 U.S. 1, 5-8 (1964); *NAACP v. Button*, 371 U.S. 415, 431 (1963).

Court's explicit citation of the "importance of the case" as a reason for granting certiorari in the cited cases establishing the protections and rights now denied by the Fourth Circuit.

Finally, the importance of these questions being resolved by this Court is enhanced by the performance of the court below. First, the panel itself admitted that the issue of the union members' right to object has "appeal." App. A at 6a. Second, although the employees believe the Supreme Court confronted and answered the first question, the panel felt "that the Supreme Court has never confronted or answered th[is] question," App. A at 7a. Third, the in banc court is evenly divided over these issues as evidenced by the Fourth Circuit's 6-5-1 vote on the petition for rehearing in banc. *See* note 1, *supra*.

## II. IN CONCLUDING UNION MEMBERS DO NOT HAVE A RIGHT TO OBJECT TO THE UNION'S POLITICAL AND IDEOLOGICAL AGENDA, THE PANEL'S DECISION CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER UNITED STATES COURTS OF APPEALS

### A. The Conflict With This Court

The panel ruled that union member employees do not have the right to object to the union's political and ideological agenda because it erroneously believed that this Court had never held that "union members employed in an agency shop[18] had a right to object." App. A at 15a. Nothing could be further from the truth. First, this Court has twice recognized objection rights in cases involving union members employed in agency shops. *Ellis*, 466 U.S. at 439-40 & n.2, 441, 444, 447, 455, 457;[19] *Abood*, 431

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[18] *See* note 11, *supra*.

[19] "As the agreement has been interpreted, employees **need not become formal members of the union**, but must pay **agency fees** equal to members' dues. Petitioners are present or former clerical employees of Western who

U.S. at 212 n.2, 231, 232, 234.[20] Secondly, at least for objection purposes, if not all purposes, as correctly noted by the district court, App. B at 52a; App. D at 75a, there is no distinction between union shops and agency shops. As this Court determined almost thirty years ago, the only form of union shop "membership" that may be required under the statute has been "whittled down to its financial core," and thus, union shops are in fact agency shops. *NLRB v. General Motors Corp.*, 373 U.S. 734, 742, 744 (1963); *see also Beck*, 487 U.S. at 745. Finally, there is no indication that an agency shop arrangement represents the limits of protection from aggressive union power provided to employees by Congress under the RLA.

Thus this Court's consistent interpretations of the RLA hold that Congress prohibited unions from supporting political and

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objected to the use of their compelled dues for specified union activities. This case is the consolidation of two separate suits, one brought by . . . employees who did not join the union, the other a **class action** brought by employees who **did [join the union]**." "Respondents—the national union [same as TCU herein, but under its previous name, BRAC or Railway Clerks], its board of adjustment, and three locals—**concede that the statutory authorization of the union shop does not permit the use of petitioners' [union members and nonmembers alike]** contributions for union political or ideological activities." "The First Amendment does limit the uses to which the union can put funds obtained from dissenting employees." *Ellis*, 466 U.S. at 439 & n.2, 439-40, 455 (emphasis added) (citations omitted in note).

[20] "Nothing in the [agency shop] agreement, however, required any teacher to join the Union, espouse the cause of unionism, or participate in any other way in Union affairs." "Some of the plaintiffs were Union members and were paying agency-shop fees under protest; others had refused either to pay or to join the Union; still others had **joined the Union and paid the fee without any apparent protest**." "**Union members** in both the public and **private** sectors may find that a variety of union activities conflict with their beliefs." "The appellants . . . specifically argue that [members and nonmembers alike] may **constitutionally** prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative. We have concluded that this argument is a meritorious one." *Abood*, 431 U.S. at 212 & n.2, 231, 234 (emphasis added).

ideological causes over the objection of employees, without regard to their membership status with the union. Moreover, the explicit provisions of the RLA permit no such distinction.

> The conclusion to which this history [of the RLA] clearly points is that § 2, Eleventh contemplated compulsory unionism to force employees to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes. One looks in vain for any suggestion that Congress also meant in § 2, Eleventh, to provide the unions with a means for forcing employees, over their objection, to support political causes which they oppose.
>
> * * * *
>
> We respect this congressional purpose when we construe § 2, Eleventh as not vesting the unions with unlimited power to spend exacted money.

*Street*, 367 U.S. at 763-64, 768 (footnote omitted).

Earlier, to save the constitutionality of the RLA and its grant of exclusive representation to labor organizations, this Court established vital limitations on unions exercising power granted by the RLA.

> [T]he [labor] representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights.
>
> * * * *
>
> We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to **protect equally** the interests of the members of

> the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both **to create and restrict** the rights of those whom it represents, but it has also imposed on the representative a **corresponding duty** . . . to exercise **fairly** the power conferred upon it in behalf of all those for whom it acts, **without hostile discrimination** against them.

*Steele v. Louisville & Nashville RR*, 323 U.S. 192, 198, 202-03 (1944) (citations omitted) (emphasis added).

More recently, relying on the principles established in *Street*, *Abood* and *Beck* concerning a union member's right to object, this Court held that

> labor unions differ from corporations in that union **members** who disagree with a union's political activities need not give up **full membership** in the organization to avoid supporting its political activities. . . . As a result, the funds available for a union's political activities more accurately reflects **members'** support for the organization's political views than does a corporation's general treasury.

*Austin*, 494 U.S. at 665-66 (emphasis added).

The panel's decision finding no state action in an agency shop under the RLA, App. A at 27a-30a, directly conflicts with this Court's findings of state action under the RLA.[21] *Ellis*, 466

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[21] The panel's refusal to find state action under the RLA is most astonishing since **all three members** of the panel had agreed in earlier decisions that state action existed under the RLA. In *Beck*, two members of the panel below, including its author, agreed with then Chief Judge Winter that, unlike § 8(a)(3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(3), the RLA

U.S. at 455-56; *Abood*, 431 U.S. at 226-27 & n.23; *Railway Employes' Dept. v. Hanson*, 351 U.S. 225, 231-32 (1956); *see also Beck*, 487 U.S. at 761.

> We compare the **agency-shop** agreement in this case to those executed under the **Railway Labor Act** simply because the existence of **governmental action in both contexts** requires analysis of the free expression question. . . . "Since neither Congress nor the state legislatures can abridge (First Amendment) rights, **they cannot grant the power to *private groups* to abridge them**. As I read the First Amendment, **it forbids any abridgment by government whether directly or *indirectly***."

*Abood*, 431 U.S. at 227 n.23, *quoting Street*, 367 U.S. at 777 (Douglas, J., concurring) (emphasis added); *see also Buckley v.*

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**did** have "the 'something more' required to convert a **union into a state actor**." *Beck v. Communications Workers*, 776 F.2d 1187, 1223 (4th Cir. 1985) (Winter, J., dissenting on finding state action under the NLRA) (emphasis added); *see also Beck v. Communications Workers*, 800 F.2d 1280, 1285, 1290, 1293 (4th Cir. 1986).

They also agreed with the finding of state action under RLA agency shop agreements. "The RLA, on the other hand, encourages **agency shop** agreements by preempting all contrary state law, and thus mandates a finding of federal government action under *Hanson*." *Beck*, 776 F.2d at 1224 n.10 (emphasis added). Finally, they quoted approvingly from *Abood*, 431 U.S. at 226 n.23 that "*Hanson* nowhere suggested that the constitutional scrutiny of the union-shop agreement was watered down because the governmental action operated less directly [under the RLA] than is true [in the public sector where the government is also the employer]." *Beck*, 776 F.2d at 1225.

Several years later, the other panel member joined the decision in *Crawford v. Air Line Pilots*, 870 F.2d 155, 160 (4th Cir. 1989), *rehearing in banc granted* May 11, 1989, which reaffirmed the existence of state action in matters involving agency shop agreements authorized by the RLA and specifically rejected the union's argument, now accepted by the panel below, that recent decisions have called the finding of state action into question.

*American Fed'n of Television & Radio Artists*, 419 U.S. 1093, 1095 (1974) (Douglas, J., dissenting from the denial of certiorari).

The panel also mistakenly cites *Street*, 367 U.S. at 750-51, 770, to support its view that "to find that the union may not collect money for political activities from its members would curtail the political activities traditionally funded by voluntary union membership prior to the enactment of the RLA." App. A at 18a. The district court, faithful to the specific holdings of this Court, recognized that the Court, in allowing union members the right to object, "did not hold that unions could not engage in political action, but more narrowly, that it could not spend the 'exacted money' of a dissenting employee." App. B at 50a. Later the district court reaffirmed that nothing in its decision "would preclude the union from pursuing political activity, so long as it afforded to those who opposed a reduction in dues without a diminishment of the right to participate in the collective bargaining process." App. B at 55a. Both the district court and this Court have totally rejected the panel's erroneous contention that adopting Kidwell's proposition could infringe on the union's First Amendment right to expressive association. App. A at 31a; *Abood*, 431 U.S. at 235-36; *Street* 367 U.S. at 770.

For, as the district court correctly found:

> The economic disincentives recognized in *Austin* are similar to those felt by Kidwell and other union members. Actual membership in the Union under a union security agreement is not "voluntary" because strong economic disincentives exist for withdrawing as a member. By resigning from the union, employees surrender the ability to participate in shaping the terms and conditions of their employment. It is true that an employee for whom the Union serves as the exclusive bargaining representative "need not become a(n actual union) member . . . to earn a living." *Austin*, __ U.S. at __, 110 S. Ct. at 1399. Nevertheless, the involuntariness of the union security arrangement, coupled with the economic disincentives to resigning from the union,

> which have been enumerated, serves as a significant damper on the right of the employees not to associate with the political expressions and views of the Union. This damper effect violates the union members' rights under the RLA and the Constitution.

App. D at 74a-75a (citations omitted).

Thus, the district court properly concluded that such union discrimination made union membership involuntary as a matter of law, thereby invoking this Court's statutory and constitutional restrictions on a union's power to compel its members to support its political, ideological and nonbargaining agenda:

> When the union, however, strays from that charter given by the Railway Labor Act, and uses dues to support candidates, religious beliefs, or any other ideological cause, it is not an answer to say to one who is opposed to those views, "leave the union." The union is the only vehicle through which the employee can participate in the terms of his or her employment. This Court concludes that in the context of governmental action that is imposed by the Railway Labor Act, the restriction on First Amendment freedoms must be drawn as narrowly as is consistent with the Congressional purpose in enacting the Railway Labor Act. As the Supreme Court in *Street*[, 367 U.S. at 764,] noted: "One looks in vain for any suggestion that Congress also meant in [the RLA] to provide the unions with a means for forcing employees, over their objection, to support political causes which they oppose."

App. B at 55a (citation omitted).

The panel was wrong in refusing to recognize the inherent involuntariness of union membership under TCU's discrimination between union member employees and nonmember employees in the amount of direct participation each group is allowed in the collective bargaining process. The unfair dilemma presented by

having employees choose between protecting political free speech or protecting a vote on the conditions or continuation of work, but not both, is wrong[22] and makes union membership involuntary as a matter of law! However, the panel's disapproval of the district court's single method of eradicating this illegal discrimination and dilemma does not justify its elimination of the violation itself. Instead, the panel should have discussed appropriate remedies.

There appear at least two ways of eliminating the discrimination and dilemma caused by the union's limitation to union members of direct participation in the collective bargaining process and its limitation to nonmembers of the right to object to the union's pet political and ideological projects. The district court, choosing one method, required the union to allow its member employees the right to object and receive a reduction in dues to the same extent and in the same manner as afforded to nonunion employees. The discrimination and dilemma could also be eradicated by requiring the union to allow nonmember employees the right to participate in the collective bargaining process to the same extent and in the same manner as afforded to union member employees.

However, disputes about the appropriate **remedy** do not negate the **employees' claim for relief**. The claim for relief exists because employees are forced to make an unlawful choice, as the district court correctly found. If this Court agrees that a claim for relief is presented, but not with the relief imposed by the district court, the panel's finding of "no claim" should still be reversed and the matter remanded to the lower courts for the task of

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[22]In *Abood*, this Court overturned a lower court's ruling that forced employees to choose between competing rights. "To require greater specificity would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure." *Abood*, 431 U.S. at 241 (note omitted).

fashioning appropriate remedies. *See Hudson*, 475 U.S. at 309 n.22.

### B. The Conflict Among Courts Of Appeals

The panel's holding that union members are not entitled to object to the union's political, ideological and nonbargaining expenditures directly conflicts with a decision of the District of Columbia Circuit on the same question.

Citing *Street* and *Allen*, the District of Columbia Circuit held that "the right of dissenting **union members** to be free of political use of their dues" "must be protected by the courts." *Marker v. Shultz*, 485 F.2d 1003, 1004, 1005 (D.C. Cir. 1973) (emphasis added).

## III. THE PANEL'S CONSIDERATION OF THE PUTATIVE CLASS REPRESENTATIVES' ASSOCIATION WITH AND THE PRESUMED POLITICAL LITIGATION PROGRAM OF A BONA FIDE, PUBLIC INTEREST LEGAL ASSISTANCE ORGANIZATION CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER UNITED STATES COURTS

### A. The Conflict With This Court

Coming unexpectedly and entirely out of left field, the panel decided to base its affirmance of the district court's denial of certification of a subclass on its reaction to the putative class representatives' association with and content of the political litigation program of the National Right to Work Legal Defense and Education Foundation, Inc.[23] The effect of injecting this

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[23]*See* notes 3 & 12, *supra*.

impermissible consideration is that a subclass of **known objectors** will not be reimbursed for the monies spent by the union on political, ideological and nonrepresentational activities, or receive any relief from the very courts this Court presumed would "remain available as the ultimate protectors of constitutional rights." *Hudson*, 475 U.S. at 307-08 n.20.

Even more incomprehensible, the panel concluded that no matter what involvement the Foundation has in this litigation, the petitioners' association with the Foundation—without any evidence in the record concerning either the Foundation or the motives of petitioners and the putative subclass—is sufficient to show "[a] potentially serious conflict of interest within the class [which] preclude[s] the named plaintiffs from representing the entire class adequately." The panel based this conclusion on its jaundiced, nonrecord opinion that both petitioners and the Foundation "want[ ] to weaken and if possible destroy the union," which it found inconsistent with its equally jaundiced, nonrecord opinion that the subclass consisted of those "nonunion employees who, while not wanting to pay more (and perhaps even wanting to pay less) than their 'fair share' fees, have no desire to ruin the union or impair its ability to represent them effectively."[24] App. A at 43a-44a.

This Court has repeatedly reaffirmed that the enforcement of "**constitutional** rights through litigation, **as a matter of law**, cannot be deemed **malicious**," *Button*, 371 U.S. at 440 (emphasis added); and the right to "associate together to help one another to **preserve and enforce rights** granted them under **federal laws** cannot be **condemned** . . . [for t]he right to petition the courts cannot be so handicapped," *Railroad Trainmen*, 377 U.S. at 7

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[24]As established in the discussion of question one, this Court has held that exercising the statutory and constitutional right to object and receive a reduction in the union's dues spent on political, ideological and other nonbargaining activities cannot ruin the union or impair its ability to represent employees effectively. *See Ellis*, 466 U.S. at 451-53; *Street*, 367 U.S. at 760-61; 768-70; *see also* p. 19, *supra*.

(emphasis added); *see also In re Primus*, 436 U.S. at 425-28, 432-34, 436, 437-38; *United Mine Workers v. Illinois St. Bar Ass'n*, 389 U.S. 217, 222-23 (1967). These rulings are not merely instructive, but controlling on the Fourth Circuit. Nevertheless, the panel considered both the putative class representatives' association with the Foundation to protect their statutory and constitutional rights, and the presumed political content of the Foundation's expressive litigation program to be malicious, as a matter of law. It then allowed that determination of maliciousness to color and prejudice its review of the propriety of the district court's denial of class certification.

The association with and political views of charitable legal assistance organizations that support litigation as a form of First Amendment-protected expression can never be a factor in deciding whether to certify a class. Like the required court instructions that the jury must disregard the prosecutor's reference to NAACP involvement in *Hammonds v. State*, 269 So.2d 924, 925 (Ala. Crim. App. 1972), this Court must instruct the Fourth Circuit to disregard the employees' association with and the political views of the Foundation when it reconsiders the district court's inexplicable refusal to certify one subclass of objectors because of the inappropriateness of the class representatives, while certifying the other subclass, **which has the same class representatives**. Perhaps if the panel had not been so blinded by its unconstitutional considerations, it could have explained how the putative class representatives' association with the Foundation created such a "significant antagonism" that one subclass of objectors denied their rights was not certified, yet the same representatives' association with the Foundation was so inconsequential that the other subclass was certified.

Even assuming that objecting employees are motivated by two different types of motivation, such a "distinction" is irrelevant

for class certification purposes.[25] There is no distinction between the rights and remedies to which objecting employees are entitled, regardless of what motivated them in the first place to object to the union's use of their dues and fees. Simply put, there is but **one** right and **one** corresponding remedy for objecting employees, no matter what their motivation.

This Court has repeatedly affirmed the rights of both those who object to everything unions do and stand for, as well as those who only object to some of the unions' activities. *Abood*, 431 U.S. at 211.[26] Both types of objectors may "constitutionally prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." *Abood*, 431 U.S. at 234. Likewise, the Court has consistently declared that all objectors, no matter how motivated, must "pay a service fee to defray the costs of collective bargaining, contract administration, and grievance adjustment," *Ellis*, 466 U.S. at 447, even though they may "oppose [the] positions taken by a union in its capacity as collective-bargaining representative." *Lehnert*, 111 S. Ct. at 1958. It is only when the union operates outside its privileged role as collective bargaining representative that objecting employees, no matter what their motivation and their views on unionism in general, may refuse "to support union activities beyond those germane to collective bargaining, contract

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[25] Moreover, any inquiry into the objector's motivation would violate the objector's constitutional rights by forcing him or her to choose between separate constitutional rights. *See* note 22, *supra*. Since it is unconstitutional to even inquire as to the basis for an employee's objection, the panel cannot require a motivational test for class certification and then disqualify Kidwell based on the presumed differences between her motivations and the subclass' motivations, with **no** record on point as to either.

[26] "The issue before us is whether [the agency shop] arrangement violates the constitutional rights of government employees[: 1)] who object to public-sector **unions as such** ***or*** [2) who object] to **various union activities** financed by the compulsory service fees." *Id.* (emphasis added).

administration, and grievance adjustment." *Beck*, 487 U.S. at 745; *see also id.* at 762-63.

### B. The Conflict Among Courts Of Appeals

In contrast to the panel's insupportable conjectures which materialized in the absence of any findings by the district court or any record concerning the Foundation or the motivations of class members, two different district courts in the Fourth Circuit, which did a complete, thorough and detailed evidentiary review of the Foundation's operations and activities, praised and acknowledged the legitimacy and noble objective of the Foundation's work and those who associate with it to litigate their statutory and constitutional rights. *George v. Baltimore City Pub. Schs.*, 117 F.R.D. 368 (D. Md. 1987); *National Right to Work Legal Defense & Educ. Found. v. United States*, 487 F. Supp. 801, 807 (E.D.N.C. 1979).

*George*, contrary to the unjustifiable speculations of the panel, specifically found, **based on a developed record**, that neither the class representatives' association with the Foundation nor the Foundation's involvement in the litigation was detrimental to certifying a class of objecting employees.[27]

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[27]*George*, 117 F.R.D. at 371 (citations omitted), made numerous other findings about the Foundation, including: 1) "the Foundation is a 'bona fide, independent legal aid organization,' which has successfully sponsored class action litigation before the Supreme Court"; 2) "outside funding of litigation by a legitimate legal aid organization" does not cause "plaintiffs to raise different claims than the proposed class or to have conflicting interests as its representative"; 3) "the Court does not detect any conflicts of interest between the proposed class and the named representatives"; and 4) "plaintiffs and the proposed class are represented by able counsel," who, incidently, is the same counsel representing petitioners here.

In addition to *George*, petitioners' counsel has been certified as class counsel in *Mitchell v. Los Angeles Unified School District*, 744 F. Supp. 938, 939-40 (C.D. Cal. 1990) and *Damiano v. Matish*, 644 F. Supp. 1058, 1059-60 (W.D. Mich. 1986), *rev'd on other grounds*, 830 F.2d 1363 (6th Cir. 1987). Other staff

Moreover, the comments concerning the Foundation and those who associate with it, contained in *Gilpin v. AFSCME*, 875 F.2d 1310, 1313, 1315, 1316 (7th Cir. 1989), a part of which the panel quoted, relied upon and agreed with, are equally misguided, inappropriate and wrong.[28] Thus, one noted commentator on class actions uses *Gilpin* as an illustration of the "logically unsound" approach, while citing *George* as following the majority and correct view that differences of opinion among the class about the wisdom and direction of the litigation does not preclude class certification. 1 *Newberg on Class Actions* § 3.30 at 213-14 (2d ed. 1985) & § 3.30 at 128-29 (1991 Supp.).

Additionally, there is a split between the decisions of other Courts of Appeals and the panel over whether a district court may consider: a) outside matters, i.e., local rules of ethics, or b) speculation concerning motivations or possible conflicts when deciding the adequacy of class representatives.

Last year the Seventh Circuit in *Rand v. Monsanto Co.*, 926 F.2d 596, 598-601 (7th Cir. 1991) invalidated a district court's reliance on a local rule of ethics to create a *per se* rule of inadequacy and an absolute bar to class certification. *See also Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981); *Button*, 371 U.S. at 438-39. Concluding that the local rule was inconsistent with Rule 23 and frustrated the use of class actions, the Seventh Circuit

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attorneys provided by the Foundation have been certified as class counsel in *Hohe v. Casey*, 128 F.R.D. 68 (M.D. Pa. 1989) and *Ellis v. Railway Clerks*, 91 L.R.R.M. (BNA) 2339, 2340-41 (1976), *incorporated*, 108 L.R.R.M. 2648 (S.D. Cal. 1980), *modified on other grounds*, 685 F.2d 1065 (9th Cir. 1982), *modified*, 466 U.S. 435 (1984).

[28]The Foundation's role in both cases was similar. Also similar was the absence of any findings by the district court or any record concerning the Foundation and those employees who associated with the Foundation for litigation purposes. *See* Petition for Leave to Intervene and Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, *National Right to Work Legal Defense & Educ. Found. v. AFSCME*, No. 89-287 (U.S. Aug. 19, 1989).

held that it could not be applied to class actions and remanded the case "so that the district court may assess the situation free of the influence of" the local rule. *Rand*, 926 F.2d at 601.

The Fifth and Ninth Circuits have ruled that mere speculation concerning possible conflicts cannot be considered in deciding class certification matters. In *Social Services Union, Local 535 v. County of Santa Clara*, 609 F.2d 944, 947-48 (9th Cir. 1979), the Ninth Circuit ruled that whether a particular representative will fairly and adequately represent a particular class of persons in a particular case is a question of fact to be determined on the basis of all of the relevant circumstances regarding the representative, the class, and the case itself. The Fifth Circuit held the propriety of a class suit can only be determined on the total record, not the conclusory declarations of the litigants. *Potts v. Flax*, 313 F.2d 284, 288 (5th Cir. 1963).[29]

Thus, mere speculations and inferences that plaintiffs would be inadequate class representatives will not suffice. Nevertheless, it was precisely these condemned speculations and inferences which the Fourth Circuit used in finding plaintiffs to be inadequate class representatives.

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[29]Unlike the panel below, the Fifth Circuit also held that it is unfounded and inappropriate to challenge class certification by reason of the intrinsic nature of the rights involved when the class suit was brought to vindicate constitutionally guaranteed civil rights. *Potts*, 313 F.2d at 288-89. The Ninth Circuit questioned "whether employees can be deemed to oppose rights which . . . are mandated by statute." *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 n.4 (9th Cir. 1978) (Kennedy, J.). Moreover, the Second Circuit held in *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 937 (2d Cir. 1968) that "[t]he fact that some members of the class were personally satisfied with the defendants' relocation efforts is irrelevant."

## CONCLUSION

TCU, based on the enormous power the RLA gives exclusive collective bargaining representatives over the represented employees, union members and nonmembers alike, has intentionally and wilfully established economic disincentives to withdrawing from membership in the union. At the same time, the union has used its statutory power to enhance the rights and privileges of union members at the expense of nonmembers, while compelling union members to support the political, ideological and nonbargaining causes they find objectionable. This Court should resolve the dispute between the courts over whether TCU's unfair discrimination and dilemma make union membership involuntary as a matter of law, and, if so, the appropriate remedy or remedies for such violations of the RLA, First Amendment and TCU's duty of fair representation.

The panel below impermissibly considered First Amendment-protected matters and the putative class representatives' association with, and the political content of, the Foundation's expressive litigation program in determining the propriety of class certification. It then engaged in speculative assumptions concerning the possible differences between the inconsequential objection motives of the putative representatives and the class. This Court should resolve the dispute between the courts on the permissibility of considering First Amendment-protected matters and speculative assumptions concerning possible motive differences in deciding class certification matters.

For these reasons and the reasons set forth above, the Court should issue a writ of certiorari to the Fourth Circuit and set the case for plenary briefing and argument on both questions presented.

Respectfully submitted,

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COUNSEL OF RECORD FOR PETITIONERS

February 1992

# APPENDICES

# APPENDIX A

## OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

**October 3, 1991**

**As Amended October 28, 1991**

[946 F.2d 283]

**Kathryn A. KIDWELL, Michael S. Coffman, Helen Eades, Ramona J. Ellis, Plaintiffs-Appellees,**

**v.**

**TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION; Transportation Communications International Union, ConRail System Board of Adjustment No. 86, Transportation Communications International Union, Seaboard System Board of Adjustment No. 3, Defendants-Appellants.**

**Kathryn A. KIDWELL, Michael S. Coffman, Helen Eades, Ramona J. Ellis, Plaintiffs-Appellants,**

**v.**

**TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION; Transportation Communications International Union, ConRail System Board of Adjustment No. 86, Transportation Communications International Union, Seaboard System Board of Adjustment No. 3, Defendants-Appellees.**

**Nos. 90-2511, 90-2512.**

United States Court of Appeals,
Fourth Circuit.

Argued July 8, 1991.

Decided Oct. 3, 1991.

As Amended Oct. 28, 1991.

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[284]Before ERVIN, Chief Judge, and PHILLIPS and MURNAGHAN, Circuit Judges.

## OPINION

MURNAGHAN, Circuit Judge:

An employee who wishes to remain a union member but desires to contribute financially only to the aspects of union [285] activities related to collective bargaining sued the union whose rules prohibited such limited membership. Several nonmember employees also sued, claiming that the union was spending their mandatory payments on activities unrelated to collective bargaining. On cross motions for summary judgment, the district court judge granted summary judgment to the union member. He reasoned that forcing employees to choose between union membership, which provided possible participation in decisions relating to employment, and nonmembership, which required no financial responsibility for or contribution to the costs of the political and ideological activities of the union, violated statutory and first amendment rights. The judge denied the nonmember employees' motion for class certification and their specific objections on the merits or found them moot. Both parties appealed. We reverse the district court's conclusion as to the right of a union member in an agency shop to pay less than full dues but affirm its disposition of the remaining issues.

### I.

Four railroad employees sued the Transportation Communications International Union ("the union").[1] The union is the collective bargaining representative for the employees under the Railway Labor Act ("RLA"), 45 U.S.C. § 152. One of the plaintiffs, Kathryn A. Kidwell, is a member of the union. The

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[1]Formerly the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees ("BRAC").

other three plaintiffs, Michael S. Coffman, Helen Eades, and Ramona J. Ellis, are not.[2]

Union security provisions in the collective bargaining agreement require that all employees pay an agency fee, comprising the dues, initiation fees, and assessments of union members. As part of the agency shop relationship, the employees are required, as a condition of employment, to pay the agency fee to the union that is voted the collective bargaining representative; however, they are not required to become union members. Agency shops differ from union shops in that regard because in a union shop, each employee technically becomes a union member. Because of a line of Supreme Court decisions discussed below, the union voted collective bargaining representative in an agency shop may arrange to collect the costs of collective bargaining from all employees, but may not compel objecting nonmember employees to pay for union activities other than those related to collective bargaining. The union thus must have an objection procedure with respect to noncollective bargaining activities available to nonmembers.

For example, under the union's current procedure, in each calendar year, for thirty days after receiving an April notice, nonmember employees may object to the expenditure of their fees on activities unrelated to collective bargaining. An objector's agency fee then will be reduced by a set percentage. The union has an independent legal expert decide which activities are chargeable and which are not, and a certified public accountant prepares the accompanying accounting materials. The union's newspaper publishes the breakdown between chargeable and nonchargeable expenses. An objector who disagrees with the amount of fee reduction may challenge it before a neutral arbitrator. The union holds all of the objector's fee payment in an interest-bearing escrow account pending the decision. The union pays all costs of the arbitration.

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[2]Initially, two of the four plaintiffs were members of the union. One of them, Eades, subsequently resigned when she retired.

The plaintiffs' initial complaint requested declaratory, monetary and injunctive relief on the grounds that the union's method for collecting and reducing dues for members and nonmembers lacked procedural safeguards and that the amount of required fees exceeded that constitutionally and statutorily permitted. In particular, the plaintiffs alleged violations of the First Amendment and § 2, Eleventh of the RLA. When the suit was first filed, the union permitted both union member and nonmember employees to object to the payment of **[286]** fees not germane to collective bargaining activities. The union apparently allowed objections by members to reduce the incentive to resign. In May 1988, however, the union changed its policies so that only nonmembers could object. The union offers two reasons for the change. First, the union argues that the change responded to the increased burden of processing each objection under procedures established in *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986). Second, the union alleges that losers in union elections were urging their supporters to object as a protest over the outcome of the election.

On cross motions for summary judgment, the district judge held that the union had to permit objecting union members to pay reduced dues.[3] The judge also held that the union's procedure for handling objections was permissible and refused to determine the actual amount of fees payable by objectors. He denied class certification of all past and future objectors; however, he certified the limited class of union members who either were not told of an opportunity to object or objected and were denied a reduction.

In the first part of the district court judge's opinion, he read *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956) and *International Ass'n of Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961) to hold that the RLA did not authorize unions to spend money on

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[3]The part of the decision requiring the union to permit union members to object has apparently been stayed by another district court pending appeal.

political causes over the objection of employees. He then read later cases—*Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977) and *Ellis v. Railway Clerks*, 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984)—to conclude that the prohibition against these union expenditures also arose from the First Amendment. The judge emphasized that, if Kidwell were a nonmember of the union, she

> can no longer vote on the representatives who are given the exclusive right to negotiate her terms of employment; she can no longer participate in the resolution of disputes over conditions of employment; and perhaps most significantly, she cannot vote on the terms and conditions of employment that the Union representatives negotiate and to which she will be subjected.... In short, at the risk of stating the choice too simplistically, she is given the option of protecting free speech or of protecting her vote on the continuation or conditions of work, but not both.

He noted that certain infringements on the First Amendment were bound up with the concept of collective bargaining. "When the union, however, strays from that charter given by the Railway Labor Act ... and uses dues to support candidates, religious beliefs, or any other ideological cause, it is not an answer to say to one who is opposed to those views, 'leave the union.'" He concluded that "in the context of governmental action that is imposed by the Railway Labor Act, the restriction on First Amendment freedoms must be drawn as narrowly as is consistent with the Congressional purpose in enacting the Railway Labor Act." Thus the judge found that Kidwell, though a union member, was entitled to a "reduction [in her union dues] attributable to all union expenses unrelated to collective bargaining."[4]

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[4]The judge issued a later memorandum and order distinguishing *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944), *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 104 S.Ct. 1058, 79 L.Ed.2d 299 (1984), and *United Steelworkers v. Sadlowski*, 457 U.S. 102,

In the second part of his opinion, the district court judge noted that since the case was filed, the Supreme Court had decided *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986). He explained that the union had changed its procedures but that the plaintiffs challenged the pre-*Hudson* procedures **[287]**as well as the newer ones. He concluded that *Hudson* could be retroactively applied to pre-1986 policies and examined the specific contentions. The only aspects that are raised on appeal involve particular objections from which the district court judge refrained because he concluded the arbitral process was the more proper avenue. The plaintiffs also have not appealed from the judge's conclusion that the procedures did not violate the union's duty of fair representation. The judge denied all damages, including the request for nominal $1.00 damages. And he denied a motion to amend the judgment to certify a class of all objectors, although he certified a smaller class relating to Kidwell's argument that members have a right to object.

Both sides appeal. The union contends that its requirement that employees either be members and, therefore, pay full dues, or be nonmembers with the right to object and seek reduction of noncollective bargaining expenditures, does not violate the Constitution or the RLA. Kidwell asserts that she has a constitutional and statutory right to be a union member and not pay costs unassociated with collective bargaining activities. The nonmember employees appeal from several of the district court's conclusions respecting the objection procedures and the denial of class certification.

II.

We recognize that the position urged by Kidwell and adopted by the district judge is not without its appeal. Why

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102 S.Ct. 2339, 72 L.Ed.2d 707 (1982). He found *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990), compatible with his conclusion.

should an employee be forced to choose between nonmembership with the right to object or membership at the cost of supporting all the union's activities, including those with which the employee may disagree for political or ideological reasons? Kidwell argues that without union membership, she cannot participate in certain union activities that have a bearing on the conditions of her employment, for example, ratification of a collective bargaining agreement or election of individuals to represent the union in collective bargaining. Aware that the Supreme Court has never confronted or answered the question Kidwell and the union pose, we have scrutinized the arguments presented by the parties. We conclude, however, that neither the RLA nor the First Amendment confers on a union member employee the right to associate as a member with the union serving as the collective bargaining representative yet pay only for the costs of union activities related to collective bargaining.[5] After summarizing the legislative and jurisprudential background to the issue, we consider Kidwell's contention first under the RLA and then under the First Amendment.

A. *The RLA, Collective Bargaining, and the Right to Object*

"The labor relations of interstate carriers have been a subject of congressional enactments since 1888." *International Ass'n of*

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[5]For the purposes of this opinion, we assume but do not decide, that if Kidwell has a right to membership in the union with a right to object, she may enjoy all the benefits of membership. We note, however, that we would not reach a different result were we to consider a "limited membership," *e.g.*, a membership in which one could participate only in the activities to which one contributed. However, we believe that cases decided under the RLA and the First Amendment establish only two kinds of union activities: 1) those related to collective bargaining activities; 2) those not related to collective bargaining activities, a.k.a. political or ideological activities. *See Communications Workers v. Beck*, 487 U.S. 735, 761, 108 S.Ct. 2641, 2656, 101 L.Ed.2d 634 (1988); *Ellis*, 466 U.S. at 447, 104 S.Ct. at 1891; *Abood*, 431 U.S. at 236, 97 S.Ct. at 1800; *Street*, 367 U.S. at 770, 81 S.Ct. at 1800; *Hanson*, 351 U.S. at 238, 76 S.Ct. at 721. We do not perceive the existence of any third category and none has been here alleged.

*Machinists v. Street*, 367 U.S. 740, 755-56, 81 S.Ct. 1784, 1793, 6 L.Ed.2d 1141 (1961). Since the Railway Labor Act of 1926, "Congress has ... consistently adhered to a regulatory policy which places the responsibility squarely upon the carriers and the unions mutually to work out settlements of all aspects of the labor relationship." *Id.* at 757, 81 S.Ct. at 1794. In 1934, Congress revised the 1926 Act to strengthen the unions and lessen the possibility of interference from employers, *e.g.*, company unions. *Id.* at 759, 81 S.Ct. at 1795. Of importance to the question before us was the decision to empower an exclusive bargaining repre[**288**]sentative elected by a majority of *all employees*:

> It was made explicit that the representative selected by a majority of any class or craft of employees should be the exclusive bargaining representative of all the employees of that craft or class. "The minority members of a craft are thus deprived by the statute of the right, which they would otherwise possess, to choose a representative of their own, and its members cannot bargain individually on behalf of themselves as to matters which are properly the subject of collective bargaining." "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents...."

*Id.* at 759-60, 81 S.Ct. at 1795 (citations omitted). Thus, the Act's creation of an exclusive bargaining representative gave "the unions a clearly defined and delineated role to play in effectuating the basic congressional policy of stabilizing labor relations...." *Id.* at 760, 81 S.Ct. at 1795. The exclusive bargaining representative system continues to the present; however, three subsequent decisions by Congress and the Supreme Court frame the present problem: the interpretation of the duty of fair representation in the RLA; the passage of § 2, Eleventh to the RLA; and the creation of a right to object in the RLA.

At the time of the 1934 revisions, Congress considered the issue of union security provisions. A security provision usually provides that, as a condition of employment, an employee must

join the union. Unlike other industries, only one union in the railway industry had security provisions in a contract. *Id.* at 751, 81 S.Ct. at 1790. Although in 1934 the railway unions attempted to obtain legislation permitting security provisions, the final bill provided that "[n]o carrier ... shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization." *Id.* at 753, 81 S.Ct. at 1792. The unions raised the issue again during World War II but a presidential Emergency Board rejected the provision. *Id.*

In 1950, Congress reevaluated the union security question "primarily in terms of its relationship to the financing of the unions' participation in the machinery created by the Railway Labor Act to achieve its goals." *Id.* at 755, 81 S.Ct. at 1793. The emerging concern involved the realization that the union's performance of collective bargaining functions entailed "the expenditure of considerable funds." *Id.* at 760, 81 S.Ct. at 1796. Expenditure of funds had gained significance after the Supreme Court's decision in *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944), which ensured that the union's expenditure of funds for collective bargaining had to be spent equally on nonunion members.

In *Steele*, the union had excluded from membership, "by the constitution and ritual of the Brotherhood," black railroad workers. *Id.* at 194, 65 S.Ct. at 228. The union, "purporting to act as representative of the entire craft of firemen," *id.* at 195, 65 S.Ct. at 228, but "without informing the Negro firemen or giving them opportunity to be heard," *id.*, then negotiated to restrict, and ultimately end, the employment of black firemen. The Court held that the union's practice violated its statutory duties. The Court explained that, under the RLA, "[t]he labor organization chosen to be the representative of the craft or class of employees is thus chosen to represent all of its members, regardless of their union affiliations or want of them." *Id.* at 200, 65 S.Ct. at 231. Basing the decision on the nature of a democratic system, the Court declared:

> Unless the labor union representing a craft owes some duty to represent non-union members of the craft ... the minority would be left with no means of protecting their interests or indeed their right to earn a livelihood by pursuing the occupation in which they are employed.... It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and **[289]** behalf, and that such a grant of power will not be deemed to dispense with all duty toward those for whom it is exercised unless so expressed.
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> We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represented, ... but it has also imposed on the representative a corresponding duty.

*Id.* at 201-02, 65 S.Ct. at 231-32.

After *Steele*, "[u]nder the statutory scheme, a union's status as exclusive bargaining representative carries with it the duty fairly and equitably to represent all employees of the craft or class, union or nonunion." *Street*, 367 U.S. at 761, 81 S.Ct. at 1796. Thus, in the 1950s, the unions, now with the unquestionable duty of equal and fair representation of all employees regardless of union membership, argued that if they had to represent all employees, it was only fair to spread the costs among all employees. As one spokesman for the unions stated, "'We believe that it is essentially unfair for nonmembers to participate in the benefits of those activities without contributing anything to the cost.'" *Id.* (citation omitted).

Eventually, Congress decided that it might be unfair to permit "'[n]onunion members ... [to] share in the benefits derived from collective agreements negotiated by the railway labor unions but [to] bear no share of the cost of obtaining such benefits.'" *Id.* at 762, 81 S.Ct. at 1796 (*quoting* H.R.Rep. No. 2811, 81st Cong., 2d Sess., at 4). An amendment to the RLA passed as "[t]hese considerations overbore the arguments in favor of the earlier policy of complete individual freedom of choice." *Id.* at 763, 81 S.Ct. at 1797. The amendment, § 2, Eleventh provided:

> Eleventh. Union security agreements; check-off
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> Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—
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> (a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

> (b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the **[290]**expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

45 U.S.C. § 152, Eleventh (subsections (c) and (d) omitted). Thus with the passage of § 2, Eleventh, two major components of the RLA were in place. And with the provision's passage came the judicial interpretation of it, and later, a parallel provision in the National Labor Relations Act ("NLRA"), § 8(a)(3), to create the right to object.

After § 2, Eleventh's passage, the unions, under their interpretation of the section, negotiated union security provisions and began to charge all employees—members and nonmembers—equal dues. The constitutionality of § 2, Eleventh was almost immediately challenged. But, in *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956), the Court held that "the requirement for financial support of the collective bargaining agency," under § 2, Eleventh did not violate the First or Fifth Amendments. *Id.* at 238, 76 S.Ct. at 721.

In 1961, a new challenge appeared, brought by employees who did not want their compelled contribution to go to the union's traditional involvement in political activities. The Court answered this question against the background of § 2, Eleventh's origins:

> The history of union security in the railway industry is marked *first*, by a strong and long-standing tradition of voluntary unionism on the part of the standard rail unions; *second*, by the declaration in 1934 of a congressional policy of complete freedom of choice of employees to join or not to join a union; *third*, by the modification of the firm legislative policy against compulsion, but only as a specific response to the recognition of the expenses and burdens incurred by the unions in the administration of the complex scheme under the Railway Labor Act.

*Street*, 367 U.S. at 750-51, 81 S.Ct. at 1790-91. The *Street* Court concluded that "Congress did not completely abandon the policy of full freedom of choice embodied in the 1934 Act, but rather made inroads on it for the limited purpose of eliminating the problems created by the 'free rider.'" *Id.* at 767, 81 S.Ct. at 1799. And thus, the Court construed § 2, Eleventh to "deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes." *Id.* at 768-69, 81 S.Ct. at 1800.

*Hanson* and *Street* had involved private employees, union shops, and the RLA. *NLRB v. General Motors Corp.*, 373 U.S. 734, 83 S.Ct. 1453, 10 L.Ed.2d 670 (1963), raised the legitimacy of the agency shop. General Motors argued that § 8(a)(3) of the NLRA only discussed "membership" and the agency shop, which did not require actual membership, therefore, was not permitted.[6] The agency shop would not entitle employees "to attend union meetings, vote upon ratification of agreements negotiated by the union, or have a voice in the internal affairs of the union." *Id.* at 737, 83 S.Ct. at 1456. The Court concluded that agency shops were acceptable, explaining that "membership" as used in the section "as a condition of employment is whittled down to its

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[6]Section 8(a)(3) is "in all material respects identical" to § 2, Eleventh. *Communications Workers v. Beck*, 487 U.S. 735, 745, 108 S.Ct. 2641, 2648, 101 L.Ed.2d 634 (1988).

financial core." *Id.* at 742, 83 S.Ct. at 1459.[7] The Court noted, "Also wide of the mark is respondent's further suggestion that Congress contemplated the obligation to pay fees and dues to be imposed only in connection with actual membership in the union, so as to insure the enjoyment of all union benefits and rights by those from whom money is extracted." *Id.* at 744 n. **[291]**12, 83 S.Ct. at 1460.[8]

The Court applied *General Motors* to the RLA and, in *Ellis v. Railway Clerks*, 466 U.S. 435, 452 n. 13, 104 S.Ct. 1883, 1894 n. 13, 80 L.Ed.2d 428 (1984), found § 2, Eleventh to authorize negotiation of an agency shop. Agency shops were once again addressed in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), this time in the context of public-sector employee unions in a non-RLA case. The Court held that an agency shop clause in a collective bargaining agreement covering governmental employees was constitutionally valid but that the union could not use money from objecting employees to support ideological or political activities not related to duties as collective bargaining representative. *Id.* at 235-36, 97 S.Ct. at 1799-1800. Recently, in *Communications Workers v. Beck*, 487 U.S. 735, 108 S.Ct. 2641, 101 L.Ed.2d 634 (1988), the Court concluded that a union under the NLRA § 8(a)(3) also could not use money collected from objecting nonmember employees for activities unrelated to collective bargaining.

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[7]The Court pointed out that even in a union-shop, if an employee failed to act in accordance with any union obligations other than the minimum dues payment, the union could terminate "formal" membership, but the employee would remain a "member" for the purposes of § 8(a)(3). The Court added that Congress only purpose in permitting union security agreements was to solve the free rider problem. 373 U.S. at 742-43, 83 S.Ct. at 1459.

[8]This statement would seem to rebut Kidwell's claim; however, the Court noted that "the significance of desired, but unavailable, union membership, or the benefits of union membership ... we leave for another case." *Id.* at 745 n. 12, 83 S.Ct. at 1460 n. 12.

The cases have answered a number of questions. The RLA is constitutional and permits agency shops. The RLA requires that the union as collective bargaining representative fairly represent all employees but that, in exchange, the union may collect money from all employees to cover these expenses. And, under the RLA, nonmember objecting employees can only be compelled to pay for activities germane to collective bargaining. In none of these cases, however, was the Court asked to decide whether an employee had a right to be a member of the union chosen as the collective bargaining agent while paying only the costs associated with collective bargaining activities.

Kidwell argues vigorously that the prior decisions of the Court use language indicating that all employees, including union members, may object and thus they compel the result here. We disagree. In not one of the cases did the Court hold the union members employed in an agency shop had a right to object.

The confusion arises because the early cases—*Hanson* and *Street*—involved union-shop provisions. In a union shop, because every employee is technically a union member, the cases did not distinguish between union members and nonmembers. Nevertheless, the Court, even when referring to union shops, recognized that the membership of an objecting employee, albeit technically a union member, differed from the union membership held by employees who wanted to be union members. For example, in *Railway Clerks v. Allen*, 373 U.S. 113, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963), the Court noted that "[a]lthough the Agreement requires employees to become union members within the 60-day period, in fact petitioners do not insist that employees actually join the union, but regard payment of the uniform exactions required by the Agreement as complete compliance therewith." *Id.* at 116 n. 2, 83 S.Ct. at 1161 n. 2. *See General Motors*, 373 U.S. at 742, 83 S.Ct. at 1459 ("membership" "as a condition of employment is whittled down to its financial core"); *Pattern Makers' League v. NLRB*, 473 U.S. 95, 106 n. 16, 105 S.Ct. 3064, 3071 n. 16, 87 L.Ed.2d 68 (1985) ("[A]n employee required by a union security agreement to assume financial 'membership' ... [is] a 'member' of the union only in the most limited sense").

Even when actual agency shops began to be addressed, the Court continued to perceive a distinction. For example, the *Abood* Court concerned itself with reversing the ruling of the Michigan Court of Appeals that "state law 'sanctions the use of nonunion members' fees for purposes other than collective bargaining.'" 431 U.S. at 232, 97 S.Ct. at 1798 (*quoting Abood v. Detroit Bd. of Ed.*, 60 Mich.App. 92, 230 N.W.2d 322, 326 (1975)). Thus, although language used by the Court could be perceived differently without regard to the facts of the case, the issue addressed was only whether the Michigan law that **[292]** required *nonmembers* to pay agency fees used for non-collective bargaining purposes was permissible. Indeed, in *Abood*, the Supreme Court implied that it was "the *additional requirement* of a union-shop arrangement that each employee formally join the union" that might not be constitutionally permissible. *Id.*, 431 U.S. at 217 n. 10, 97 S.Ct. at 1791 (emphasis added).

Similarly, in *Ellis v. Railway Clerks*, 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984) the Court perceived a difference between "voluntary members" and "those whose membership is forced upon them." *Id.* at 445, 104 S.Ct. at 1891. Moreover, the Court repeatedly referred to "nonmembers" as the objecting employees. For example, the Court wrote that "it would be perverse to read it [§ 2, Eleventh] as allowing the union to charge to objecting nonmembers part of the costs of attempting to convince them to become members." *Id.* at 452 n. 13, 104 S.Ct. at 1894 n. 13. Similarly, the Court stated that "[w]e would have no hesitation in holding ... that the union lacks authorization under the RLA to use nonmembers' fees for death benefits they cannot receive." *Id.* at 455 n. 14, 104 S.Ct. at 1896 n. 14. And, the Court permitted expenditures for social activities after noting that these "activities are formally open to nonmember employees." *Id.* at 449, 104 S.Ct. at 1893.

The most recent cases to be decided, perhaps recognizing the issue that Kidwell raises, carefully distinguish between union member and nonmember employees. For example, in *Beck*, the Court wrote "that § 2, Eleventh of the RLA does not permit a union, over the objections of nonmembers, to expend compelled

agency fees on political causes." 487 U.S. at 745, 108 S.Ct. at 2648; *see id.* at 752, 758, 759, 760, 761, 108 S.Ct. at 2651, 2655, 2655, 2656, 2656. We have followed the approach in *Dashiell v. Montgomery Co., Md.*, 925 F.2d 750, 754 (4th Cir.1991) ("The First Amendment will not tolerate a compulsory subsidization, even if only temporarily, by nonunion employees of fees used for union activities unrelated to collective bargaining.").

After having examined these cases, we believe that, as a semantic matter, the early cases based the right to object on compelled membership and the most recent cases extend the right to object in an agency shop only to nonmembers. Thus, we suspect that to the degree the Court can be said to have addressed the matter, its precedent goes against Kidwell. However, we conclude that the issue has not been directly addressed, *i.e.*, conclusively decided, and so we move beyond semantics.

B. *The Right to Object under the RLA*

In the agency shop context, the RLA, and the judicial interpretation of it, extend the right to object only to nonmember employees. The Court found the right to object for involuntary members of union shops by construing the RLA to authorize unions to compel fees only for the duties placed upon them by the RLA, namely, collective bargaining activities. In the absence of § 2, Eleventh, the unions could not have obtained any money from employees who chose not to be members of the union, *Street*, 367 U.S. at 762, 770, 81 S.Ct. at 1796, 1800, therefore the unions could only use this "coerced" money for the limited purpose for which § 2, Eleventh was enacted—to solve the "free rider" problem by sharing "the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes." *Id.* at 764, 81 S.Ct. at 1797. The rationale, elucidated in *Street*, struck a balance. If coerced employees had to pay for the union's political activities, it would mean "that Congress sanctioned an expansion of historical practices in the political area by the rail unions." *Id.* at 770, 81 S.Ct. at 1800. The Court refused to allow unions greater power

to collect money but also declined to curtail "the traditional political activities of the railroad unions." *Id.* The *Street* Court held that its holding meant "only that those unions must not support those activities, against the expressed wishes of a dissenting employee, with his exacted money." *Id.*

The reasoning behind *Street* goes far to dissolve Kidwell's argument. Where the employee has a choice of union membership **[293]** and the employee chooses to join, the union membership money is not coerced. The employee is a union member voluntarily. Moreover, to find that the union may not collect money for political activities from its members would curtail the political activities traditionally funded by voluntary union membership prior to the enactment of the RLA. *Id.* at 750-51, 770, 81 S.Ct. at 1790-91, 1800.

The *Street* rationale remains valid. Even after *Abood* with its First Amendment analysis,[9] the Court returned in *Ellis* to base the right for nonmembers to object in the RLA. The Court echoed *Street*: "Congress' essential justification for authorizing the union shop was the desire to eliminate free riders—employees in the bargaining unit on whose behalf the union was obliged to perform its statutory functions, but who refused to contribute to the cost thereof." 466 U.S. at 447, 104 S.Ct. at 1892. The *Ellis* Court emphasized that because "[o]nly a union that is certified as the exclusive bargaining agent ...," *id.* at 447-48, 104 S.Ct. at 1892, could collect fees, "[u]ntil such a contract is executed, no dues and fees may be collected from objecting employees who are not members of the union...." *Id.* at 448, 104 S.Ct. at 1892. Thus, once again the Court reasoned that the union's right to collect money from objecting nonmembers arose only because of the RLA, and therefore the RLA limited an

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[9]The objection right in *Abood*, of course, had to be based on the First Amendment because at issue was a Michigan state law similar to § 2, Eleventh. The Michigan courts had construed the law to permit unions to use nonmember fees for purposes other than collective bargaining. 431 U.S. at 232, 97 S.Ct. at 1798.

objecting nonmember employee's burden under § 2, Eleventh to expenditures "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labormanagement issues." *Id.*

That the right to object is intended to benefit *only* nonmembers—those employees who, in the absence of the collective bargaining arrangements, would prefer not to be involved at all with the union—is demonstrated by *Beck*, decided under the parallel provision in the NLRA, § 8(a)(3). In *Beck*, 487 U.S. 735, 108 S.Ct. 2641, 101 L.Ed.2d 634 (1988), the Court found the political objection limitation of the RLA present in the NLRA.[10] The Court read *Street* to hold that "§ 2, Eleventh of the RLA

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[10]Three justices—Justices Blackmun, O'Connor, and Scalia—concurred and dissented. They argued that Congress had not intended in enacting § 8(a)(3) "to limit either the amount of 'agency fees' ... a union may collect under a union-security agreement, or the union's expenditure of such funds." 487 U.S. at 763, 108 S.Ct. at 2658. They noted that "the legislative history indicates that Congress affirmatively declined to place limitations on either the amount of dues a union could charge or the uses to which it could put these dues." *Id.* at 773, 108 S.Ct. at 2662. The dissent argued that a fundamental difference existed between the RLA and the NLRA: unlike the NLRA, the RLA was based on a tradition without union security agreements and Congress had entered the field only to permit the collection of fees from all employees to solve the free rider problem. According to the dissent, the RLA had to be narrowly construed because Congress was extending authority to unions where none had existed; however, with the NLRA, Congress was attempting to "limit only the most serious abuses of compulsory unionism." *Id.* at 775, 108 S.Ct. at 2664.

We doubt that the three justices, willing to require all employees under the NLRA to pay for all union activities, would accept that the RLA not only permits nonmembers to object, but requires the union to allow its own members to object. Indeed, like the majority, the three Justices assumed that full "membership" in the union was not contemplated by the RLA and the NLRA. They explained that "'membership' as used ... means not *actual* membership in the union but rather 'the payment of initiation fees and monthly dues.'" *Id.* at 765 n. 4, 108 S.Ct. at 2659 n. 4 (*quoting General Motors*, 373 U.S. at 742, 83 S.Ct. at 1459 (emphasis in original)).

does not permit a union, over the objections of *nonmembers*, to expend compelled agency fees on political causes." 487 U.S. at 745, 108 S.Ct. at 2648 (emphasis added). It read *Ellis* to hold that "'Congress' essential justification for authorizing the union shop' limits the expenditures that may properly be charged to *nonmembers* under § 2, Eleventh to those 'necessarily or reasonably incurred for the purpose of performing the duties of an exclusive [bargaining] representative.'" *Id.* at 752, 108 **[294]** S.Ct. at 2652 (emphasis added) (*quoting Ellis*, 466 U.S. at 447-48, 104 S.Ct. at 1892).

Moreover, the Court repeatedly suggested that § 8(a)(3) was concerned with "the rights of *nonmembers* who are compelled to pay union dues...." *Id.*, 487 U.S. at 758, 108 S.Ct. at 2655 (emphasis in original). For example, the petitioners had argued that Congress' rejection of a House bill that suggested regulation of union finances was significant in interpreting § 8(a)(3). The Court distinguished the bill by explaining that it had "sought to establish a 'bill of rights for union *members*' vis-a-vis their union leaders," and addressed "internal union affairs" rather than the "rights of nonmembers." *Id.* at 758, 108 S.Ct. at 2655 (emphasis in original). The Court added, "Congress understood § 8(a)(3) to afford nonmembers adequate protection by authorizing the collection of only those fees necessary to finance collective-bargaining activities...." *Id.* at 759, 108 S.Ct. at 2655. And it concluded that "Congress understood § 8(a)(3) simply to enable unions to charge nonmembers only for those activities that actually benefit them." *Id.* at 760, 108 S.Ct. at 2656.[11]

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[11]Kidwell calls our attention to footnote 8 of the opinion and the sentence that states: "the uniformity requirement inures to the benefit of dissident union members as well, by ensuring that if the union discriminates against them by charging higher dues, their failure to pay such dues cannot be ground for discharge." 487 U.S. at 753 n. 8, 108 S.Ct. at 2653 n. 8. We have concluded that the aim was to emphasize that the union cannot apportion the costs of collective bargaining unevenly even among members.

Although *Beck* was decided under the NLRA, the Court relied heavily on the RLA and cases construing it. *Id.* at 745-46, 750-56, 761-62, 108 S.Ct. at 2648-49, 2650-54, 2656-57. Indeed, the Court stated that § 8(a)(3) of the NLRA and § 2, Eleventh of the RLA had "parallel purpose[s], structure, and language" and should be interpreted "in the same manner." *Id.* at 752, 108 S.Ct. at 2652. We thus find highly persuasive *Beck's* extension only to nonmembers of the right to object.

Although the compelled nature of nonmember contributions justifies limiting them to the collective bargaining activities contemplated by the RLA, nothing in the RLA supports such a limit on contributions by voluntary union members. Of course, members' contributions are statutorily limited in the federal election area. One section of the laws governing federal election campaigns requires contributions or expenditures from unions to federal elections to be voluntarily obtained from informed union members. 2 U.S.C. § 441b; *see Pipefitters v. United States*, 407 U.S. 385, 92 S.Ct. 2247, 33 L.Ed.2d 11 (1972); *American Fed. of Labor & Cong. of Ind. Orgs. (AFL-CIO) v. Federal Election Comm'n*, 628 F.2d 97 (D.C.Cir.), *cert. denied*, 449 U.S. 982, 101 S.Ct. 397, 66 L.Ed.2d 244 (1980). But that limitation appears to be the only one on members' contributions to the union for political activities. Congress was "fully conversant with the long history of intensive involvement of the railroad unions in political activities." *Street*, 367 U.S. at 767, 81 S.Ct. at 1799. "Congress was well aware of the broad scope of traditional union activities," *Ellis*, 466 U.S. at 446, 104 S.Ct. at 1891, and "that unions had historically expended funds in the support of political candidates and issues." *Id.* at 447, 104 S.Ct. at 1891. In light of this knowledge, the absence of further explicit restrictions on membership fees is notable. *See Beck*, 487 U.S. at 756-61, 108 S.Ct. at 2654-56.

Kidwell, however, argues the enactment of the RLA gave the union power over the conditions of her employment and so her decision about union membership can no longer be understood as truly voluntary. According to the district judge, without

union membership, as merely an agency shop member, she has to give up the following rights or privileges:

> 1. Voting on "the representatives who are given the exclusive right to negotiate her terms of employment."
>
> 2. Voting "on the terms and conditions of employment that the Union representatives negotiate and to which she will be subjected."
>
> 3. Participating in "the resolution of disputes over conditions of employment."

**[295]** Although we understand Kidwell's desire to participate in those activities, the RLA does not contemplate the direct employee participation that Kidwell claims. Moreover, the RLA assures that all employees, regardless of union membership, obtain the same benefits.

The first privilege, the right to vote on collective bargaining representatives, Kidwell cannot actually even relinquish. The RLA guarantees to each employee the right to vote on the exclusive collective bargaining representative. Section 2, Second, Third, Fourth, and Ninth state that "*employees*" vote on the collective bargaining representative. 45 U.S.C. § 152. The Court has explained the role of the bargaining representative under parallel provisions in the NLRA:

> [The NLRB] exemplifies the faith of Congress in free collective bargaining between employers and their employees when conducted by freely and fairly chosen representatives of appropriate units of employees.... Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented.... A bargaining representative ... often is a labor organization but it is not essential that it be such. The employees represented often are members of the

> labor organization which represents them at the bargaining table, but it is not essential that they be such. The bargaining representative, whoever it may be, is responsible to, and owes complete loyalty to, the interests of all whom it represents.

*Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-38, 73 S.Ct. 681, 686, 97 L.Ed. 1048 (1953). "If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized," the Mediation Board must investigate and certify "the name or names of the individuals or organizations that have been designated...." Section 2, Ninth. To carry out this duty, the Board can require a secret poll of all employees. Thus all employees vote on the individual or organization designated the collective bargaining representative.

Apparently what Kidwell dislikes is that, in the present case, the employees vote to designate the union and then the union votes on a particular individual or individuals to represent the union. If Kidwell is not a union member, then admittedly she has no vote on the union's internal delegation. But Kidwell's inability to vote on the internal delegation if she relinquishes union membership does not deprive her of her initial vote. The process appears to be an acceptable and expected delegation of authority from all employees to the union and then to a smaller decision-making group within the union. If Kidwell objects to the designation of the union in the first place, she has remedies. She can convince a majority of her coworkers to vote only for specific individuals rather than the union or for some other union or association.

The second privilege, ratification of the terms and conditions of employment negotiated, follows from the internal union delegation. When a union votes to choose an individual or individuals to negotiate the terms and conditions of employment, union ratification of the negotiated agreement appears to be a proper method of delegating and reconfirming the union's authority. The process of delegation and ratification has long been held in this country to be an appropriate process when one

wants to assure that the body politic has approved the issue. U.S. Const. art. V. The best way for the "union" to fulfill its responsibility as collective bargaining representative may be by delegation and ratification. Once again, if Kidwell dislikes choosing an entire union as the bargaining representative and the union's subsequent internal delegation and ratification, she can convince the majority of employees to select an individual or an independent group as the collective bargaining representative.

In fact, the Court has rejected a similar argument about ratification under the NLRA when made by a company. In *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 78 S.Ct. 718, 2 L.Ed.2d **[296]**823 (1958), the Court held that an employer could not require that the union as the collective bargaining representative agree to a "ballot clause" under which *all employees*, union and nonunion, would vote by secret ballot on the acceptance of the company's final offer. *Id.* at 343-44, 78 S.Ct. at 720. The Court explained,

> "The 'ballot' clause ... deals only with relations between the employees and their unions. It substantially modifies the collective bargaining system provided for in the statute by weakening the independence of the 'representative' chosen by the employees. It enables the employer, in effect, to deal with its employees rather than with their statutory representative."

*Id.* at 350, 78 S.Ct. at 723. The reasoning of *Wooster* would seem equally to apply to a case brought by an employee under the RLA.

The third privilege Kidwell claims, participation in the resolution of disputes, is delegated to the exclusive bargaining representative as an inherent part of the RLA scheme. Once the employees have voted on a collective bargaining representative, that representative has a duty fairly to represent all employees. *See Steele*, 323 U.S. at 201-2, 65 S.Ct. at 231. That representative, bound by the duty of fair representation, has broad authority under the RLA. *Id.* The second provision of the RLA states

that "[a]ll disputes between a carrier ... and its ... employees shall be considered, and if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer...." 45 U.S.C. § 152, Second. Similarly, the sixth provision states that disputes arising out of grievances or the interpretation of agreements are to be decided between "the designated representative ... of such employees" and the carrier. *Id.*, Sixth. The entire plan of the RLA is to reduce labor problems by requiring a single representative of the employees and the carrier to settle issues. *Street*, 367 U.S. at 760, 81 S.Ct. at 1795; *Hanson*, 351 U.S. at 233-34, 76 S.Ct. at 718-19. Thus, the NLRA and the RLA "give[ ] a bargaining representative not only wide responsibility but authority to meet that responsibility." *Huffman*, 345 U.S. at 339, 73 S.Ct. at 686-87; *see Steele*, 323 U.S. at 202, 65 S.Ct. at 232.

Moreover, the Court has upheld a union's decisions to limit these exact issues to union members under parallel provisions in the NLRA. For example, in *NLRB v. Financial Inst. Employees*, 475 U.S. 192, 106 S.Ct. 1007, 89 L.Ed.2d 151 (1986), the National Labor Relations Board ("NLRB") had required the union to permit nonmember employees to vote on the union's decision to affiliate. On appeal, the NLRB did not even argue that all employees must be allowed to participate in the affiliation process; it argued only that requiring that all employees vote was a reasonable way to protect the right to select a bargaining representative. The Supreme Court rejected even the NLRB's narrow argument. The Court explained that, in the absence of the issue of whether a majority of the employees continued to support the affiliated union, the NLRB "violated the policy Congress incorporated into the Act against outside interference in union decisionmaking." *Id.* at 204, 106 S.Ct. at 1014. The Court continued by observing that the effect on representation was no different from the "many decisions" made by the union that "'affect' its representation of nonmember employees." *Id.* at 205, 106 S.Ct. at 233. The Court explained, "It may decide to call a strike, ratify a collective-bargaining agreement, or select union officers and bargaining representatives." *Id.* at 205, 106

S.Ct. at 233. We pause to emphasize that Kidwell has claimed a right to participate in those same issues. The Court concluded,

> [T]he Act allows union members to control the shape and direction of their organization, and "[n]on-union employees have no voice in the affairs of the union." We repeat, dissatisfaction with the decisions union members make may be tested by a Board-conducted representation election only if it is unclear whether the reorganized union retains majority support.

[297] *Id.* at 205-06, 106 S.Ct. at 233 (citation omitted).

Kidwell's claim depends on an employee's right to participate in all aspects of all decisions related to conditions of employment. As discussed above, however, the rights accorded an individual employee under the RLA are not so infinite. The employee, regardless of union membership, has the right to vote on the collective bargaining representative. The employee, regardless of union membership, has the right to be represented fairly and heard by the collective bargaining representative. But, if the majority of all employees should choose a union as representative, the employee does not have the right to participate in each and every aspect of the union's internal actions in carrying out its duties as representative.

Therefore, at least so far as the RLA is concerned, the union can offer every employee two choices: (1) union membership, and with it, if the union is elected collective bargaining representative, a right to vote on the internal delegation of collective bargaining power, the ratification of the negotiated agreement, and any political or other cause in which the union by majority vote decides to participate but with the responsibility for paying complete dues or (2) a nonmembership with the right to vote on whether the union should be the collective bargaining representative and responsible, if the union is so elected, for paying only the portion of the dues related to collective bargaining activities. The union's refusal to allow objections by members does not violate the RLA.

*C. The First Amendment and the Right to Object*

Kidwell argues, however, that, even if the RLA does not contain a right to object for union members, the First Amendment mandates such an option. We do not believe that the First Amendment contains any right that can be extended to cover Kidwell's proposition. Moreover, we believe that adopting Kidwell's proposition could infringe on the union's First Amendment right of expressive association. It would cause to rise, in another guise, the free rider situation by permitting union members to avoid paying a fair share of political activity expenses incurred by an organization which they had voluntarily joined.

To raise the First Amendment argument, the union's actions must constitute state action. We are inclined to believe, however, that no state action exists outside of the narrow area of those actions taken by the union as the collective bargaining representative.

The state action prerequisite "'preserves an area of individual freedom,'" and permits "citizens to structure their private relations as they choose subject only to the constraints of statutory or decisional law." *Edmonson v. Leesville Concrete Co., Inc.*, — U.S. —, 111 S.Ct. 2077, 2082, 114 L.Ed.2d 660 (1991) (citation omitted). State action has been found where the deprivation of constitutional rights has been caused by "the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible," *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 2753, 73 L.Ed.2d 482 (1982), and where "the private party charged with the deprivation could be described in all fairness as a state actor." *Edmonson*, 111 S.Ct. at 2083. The issue of state action focuses upon whether the government can be held responsible for the private party's actions. Of late, the Supreme Court has indicated that such responsibility rarely arises unless the government "'has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must be deemed to be that of the [government].'" *San Francisco Arts & Athletics v. U.S.*

*Olympic Comm.*, 483 U.S. 522, 546, 107 S.Ct. 2971, 2986, 97 L.Ed.2d 427 (1987) (citation omitted).

Although the Court construes § 8(a)(3) of the NLRA and § 2, Eleventh of the RLA as "in all material respects identical" and as "'statutory equivalent[s],'" *Beck*, 487 U.S. at 745-46, 108 S.Ct. at 2648-49, the state action area is more confused. Section 2, **[298]** Eleventh "pre-empts state laws that would otherwise ban union shops." *Beck*, 487 U.S. at 746 n. 3, 108 S.Ct. at 2649 n. 3; *see id.* at 761, 108 S.Ct. at 2656. The NLRA does not; rather, it "expressly preserves the authority of States to outlaw union-security agreements." *Id.* at 761, 108 S.Ct. at 2656. The RLA's preemption became the basis for a finding of state action. In *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956), the Court stated that, if "private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded." *Id.* at 232, 76 S.Ct. at 718. Although recognizing that "it takes a private agreement to invoke the federal sanction," the Court held that the "enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates...." *Id.* The Court has explained the *Hanson* decision as providing that "the negotiation and enforcement of such [union security] provisions in railroad industry contracts involve[ ] 'governmental action' and is therefore subject to constitutional limitations." *Beck*, 487 U.S. at 761, 108 S.Ct. at 2656.

The trend under the NLRA, however, has been to find no state action. In *Beck*, the Court declined to "decide whether the exercise of rights permitted, though not compelled, by § 8(a)(3) involves state action." *Id.* The Court went on to cite two Supreme Court cases in which union decisions had been found not to involve state action. *United Steelworkers v. Sadlowski*, 457 U.S. 102, 102 S.Ct. 2339, 72 L.Ed.2d 707 (1982), involved the union's internal rule that only members could contribute to union election funds and a challenge to it under a federal statute. In a footnote, the Court stated that the First Amendment rights of free speech and association were irrelevant because "the union's decision to adopt an outsider rule does not involve state action."

*Id.* at 121 n. 16, 102 S.Ct. at 2350 n. 16. In *United Steelworkers v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), the Court concluded that the union's negotiation of the affirmative action plan did not involve state action. *Id.* at 200, 99 S.Ct. at 2725. In the *en banc* opinion in *Beck*, the Fourth Circuit also declined to address the state action issue although at least five members of the Court believed that no constitutional basis for relief existed. *See Beck*, 800 F.2d 1280, 1290 (4th Cir.1986) (*en banc* ) (concurring opinion). Other circuits, however, have found no state action under the NLRA. *See, e.g., Price v. International Union, United Auto. Aerospace & Agric. Implement Workers*, 927 F.2d 88, 91-92 (2d Cir.1991), *petition for cert. filed* (June 3, 1991) (No. 90-1855); *Kolinske v. Lubbers*, 712 F.2d 471, 474-80 (D.C.Cir.1983); *Hovan v. Carpenters*, 704 F.2d 641, 642-45 (1st Cir. 1983).

In light of a growing reluctance to find state action under the NLRA, we examine the scope of state action present under the RLA. The coercive effect of the RLA over nonmember employees and its preemption of state law often give rise to state action. *See Hanson*, 351 U.S. at 232, 76 S.Ct. at 718. But often does not necessarily mean always. Many decisions by a union that has been elected collective bargaining representative, for example, support of a local political candidate or the design for the union's softball team uniforms, can hardly be considered state action. The mere fact of regulation of some aspects of the union's duties under the RLA does not give rise to state action. *See West v. Atkins*, 487 U.S. 42, 52 n. 10, 108 S.Ct. 2250, 2257 n. 10, 101 L.Ed.2d 40 (1988); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974).

But what of areas in which the union has adopted internal rules to carry out its governmental authority? The RLA does not specifically authorize or require such rules. The RLA only addresses the conduct of the actual collective bargaining representative and addresses the representative almost as if it were a single person. It does not address how an entity chosen as representative should arrange its decisionmaking process so that it acts as a single person. Moreover, the RLA does not specify

membership criteria for the collective bargain[299]ing representative. The union actions challenged by Kidwell involve those internal union matters. If the government is not responsible for the termination decisions of heavily regulated utilities with electricity monopolies, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974), the decision to transfer or discharge Medicaid patients by extensively regulated and federally subsidized nursing homes, *Blum v. Yaretsky*, 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982), the decision to discharge employees by extensively regulated private schools serving a mandatory public function with almost complete public funding, *Rendell-Baker v. Kohn*, 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982), the enforcement of the federally granted right to prohibit uses of "Olympic" by the federally chartered United States Olympic Committee which represents the United States government's interests in international amateur sports, *see San Francisco Arts & Athletics*, 483 U.S. 522, 107 S.Ct. 2971, and the findings of the NCAA that a state university's basketball coach violated NCAA rules which resulted in that coach's suspension, *see National Collegiate Athletic Assoc. v. Tarkanian*, 488 U.S. 179, 109 S.Ct. 454, 102 L.Ed.2d 469 (1988), we do not believe that state action would exist over the internal membership and procedural decisions of a union chosen collective bargaining representative under the RLA. Moreover, although we make no attempt to condone the membership exclusion practiced by the union in *Steele*, the Court did distinguish between the duties of the union elected collective bargaining representative under the RLA and that union's "right to determine eligibility to its membership." *Steele*, 323 U.S. at 204, 65 S.Ct. at 233; *see Hovan*, 704 F.2d at 644-45. The union's decision in the present case over the requirements for membership, although having an impact on those who may participate in the union's duties in carrying out its role as collective bargaining representative, does not constitute state action.

However, even assuming state action existed, we do not believe that the choice offered to Kidwell violates any First Amendment rights. Kidwell bases her argument on the First Amendment but the precise origin and content of her claimed

rights are not clear. Kidwell appears to allege a First Amendment right to associate with a group that makes decisions relating to her employment along with a First Amendment right not to pay for the political and ideological activities of the group. We perceive no First Amendment right to object to certain expenditures where membership is not required as an actual or *de facto* condition of employment. We cannot find any precedent for a right just to associate with any group without regard to the group's requirements. And, we have severe reservations about impinging on the union's First Amendment right to expressive association.

We agree with Kidwell that cases have found a First Amendment right not to pay for political and ideological costs of an association to which one is a member. In every case, however, membership was either actually compelled or in essence was required to retain employment. In *Abood*, the plaintiffs argued that their First Amendment right arose because they had been prohibited from "refusing to associate." 431 U.S. at 234, 97 S.Ct. at 1799.[12] The Court wrote that the First Amendment principles,

> that in a free society one's beliefs should be shaped by his mind and conscience rather than coerced by the State ... prohibit a State from compelling any individual to affirm his belief in God or to associate with any political party *as a condition of retaining public employment.* They are no less applicable to the case at bar, and they thus prohibit the appellees from requiring any of the appellants to contribute to the support of an ideological cause he may oppose *as a condition of holding a job as a public school teacher.*

[300]*Id.* at 235, 97 S.Ct. at 1799 (emphasis added) (citations omitted). The *Abood* Court thus based its reasoning on the idea

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[12]Recall that in *Abood*, the Michigan courts had construed a Michigan statute to require union member and nonmember employees to pay equal dues, with no objection right, as *a condition of employment*.

that a contribution required to keep a job had to be narrowly construed. The *Abood* Court went on to explain:

> We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas *and who are not coerced into doing so against their will by the threat of loss of governmental employment.*

*Id.* at 235-36, 97 S.Ct. at 1800 (emphasis added).

In *Keller v. State Bar of California*, — U.S. —, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990), the Court addressed whether an attorney's *mandatory* contributions to the California State Bar could be used for political and ideological activities. All attorneys practicing in California had to be members of the State Bar. *Id.*, 110 S.Ct. at 2235. The State Bar, however, used the funds from the compelled membership to lobby and engage in other political or ideological causes. Under the State Bar system, no one could be a nonmember of the State Bar and only pay for the minimum costs of bar-related activities. A unanimous Court concluded that an attorney could be asked to contribute to an organization that espoused views of the majority but with which the individual disagreed. *Id.* However, the Court held that the State Bar could not use the mandatory compelled dues of objecting lawyers to fund political and ideological activities. *Id.* at 2236.

In both cases, a person's right to engage in employment triggered the First Amendment right to object: in *Abood*, employees had to pay full union dues, albeit as an agency fee, to keep their jobs; in *Keller*, attorneys had to pay full dues to the Bar to practice in California. The Court's decisions recognize that the cost of engaging in employment regulated by an association cannot automatically include amounts that will go to political

or ideological activities of the association. To keep a job, one cannot be forced to contribute to the majority's political desires. Kidwell faces no such quandary. She may keep her job by paying only the minimum nonpolitical and nonideological component of the union's dues. If she chooses to join the union, she is no longer an involuntary contributor and may be bound by the will of the majority. Put simply, the political activities which a majority wishes to engage in will probably result in expenses. They are very like the lunch which is never free. Choosing voluntarily to join the union, a member must meet her or his share of the expenses.

The discussion in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990), does not compel a different result. In *Austin*, the Court upheld a Michigan law prohibiting corporations from using their treasuries directly to support or oppose state political candidates, despite the argument that the statute was underinclusive because it excluded labor unions. The Court distinguished "labor unions" from "corporations." The Court explained that "union members who disagree with a union's political activities need not give up full membership in the organization to avoid supporting its political activities." *Id.*, 110 S.Ct. at 1400. Although standing alone, the language perhaps appears to support Kidwell's argument, the paragraph continued:

> Although a union and an employer may require that all bargaining unit employees become union members, a union may not compel those employees to support financially "union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment." ... An employee who objects to a union's political activities thus can decline to contribute to those activities, *while continuing to enjoy the benefits derived from the union's performance of its duties as the exclusive representative of the bargaining unit on labor-management issues.*

[301] *Id.* at 1401 (emphasis added) (*quoting Beck*, 487 U.S. at 745, 108 S.Ct. at 2648). Thus, read in context, the Court's statement

that an employee was not required to "give up full membership," referred to union shops and membership in the limited sense that all employees receive the benefits obtained by the union regardless of financial support for the union's political activities. A corporate shareholder, employee, or customer cannot obtain the nonpolitical and nonideological benefits of involvement with the corporation without perhaps unwillingly contributing to political or ideological activities. *Id.*, 110 S.Ct. at 1398-99. Under the RLA, however, an employee will always be assured of the benefit of the nonpolitical and nonideological collective bargaining activities of the union without regard for union membership.[13] *Austin* does not support a member's right to object.[14]

We agree with the *Austin* Court that disincentives less extreme than loss of employment may trigger the right to object. 110 S.Ct. at 1399. The disincentives for Kidwell if she is not a union member, however, are not extreme. She can vote on the collective bargaining representative. She will always be fairly represented by that representative. And she can form a rival group for the noncollective bargaining activities. That membership does have some privileges is not enough to raise a First Amendment right to object.

In the absence of a right to object as a member, Kidwell claims a right to associate with the union on her own terms, *i.e.*, refusing to contribute to activities unrelated to collective bar-

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[13]We note that the dissenting Justices—Justices Scalia, Kennedy, and O'Connor—felt that, even in a corporation, "the disincentives to disassociate are not comparable.... One need not become a member of the Michigan Chamber of Commerce or the Sierra Club in order to earn a living. To the extent that members disagree with a nonprofit corporation's policies, they can seek change from within, withhold financial support, cease to associate with the group, or form a rival group of their own." 110 S.Ct. at 1424 (Kennedy, J., dissenting).

[14]The citation to *Beck* supports this conclusion. Moreover, the Court described *Abood* as "holding that compelling *nonmember* employees to contribute to union's political activities infringes employees' First Amendment rights." 110 S.Ct. at 1400 (emphasis added).

gaining. The union, however, claims a right to associate with people who are interested in contributing to those noncollective bargaining related activities.

The Court has stated that, although "the First Amendment does not in terms protect a 'right of association,' our cases have recognized that it embraces such a right in certain circumstances." *Dallas v. Stanglin*, 490 U.S. 19, 23-24, 109 S.Ct. 1591, 1594, 104 L.Ed.2d 18 (1989). Two "senses" of freedom of association have been recognized. The first, inapplicable to either the union or Kidwell, is a right "'to enter into and maintain certain intimate human relationships.'" *Id.* at 24, 109 S.Ct. at 1594 (*quoting Roberts v. United States Jaycees*, 468 U.S. 609, 617, 104 S.Ct. 3244, 3249, 82 L.Ed.2d 462 (1984)). The second is "'a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.'" *Id.* A union appears to be an archetype of an expressive association. *See Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548-49, 107 S.Ct. 1940, 1947, 95 L.Ed.2d 474 (1987); *see also Conti v. City of Fremont*, 919 F.2d 1385, 1388-89 (9th Cir.1990) (no First Amendment associational right of entertainment owner to do business with 18-20 year olds); *Watson v. Fraternal Order of Eagles*, 915 F.2d 235, 243-44 (6th Cir.1990) (private drinking club had no First Amendment protection).

The Court has examined rights of association not by looking at whether the person has a right to be included, but rather whether the association has a right to exclude:

> There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views **[302]** that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate.

*Roberts v. United States Jaycees*, 468 U.S. 609, 623, 104 S.Ct. 3244, 3252, 82 L.Ed.2d 462 (1984). Eradicating discrimination provides a sufficiently compelling state interest that courts or states may force associations to accept members if such compulsion is the least restrictive means available. *Id.*

Kidwell's desire for membership at the reduced price has little constitutional compulsion. For example, in *Minnesota Bd. of Community Colleges v. Knight*, 465 U.S. 271, 104 S.Ct. 1058, 79 L.Ed.2d 299 (1984), the Court held that the rights of nonunion teachers at a community college were not violated by an exclusive state statutory right of the union to meet and confer on nonmandatory subjects with the state. The Court recognized that the nonunion teachers would feel pressure to join the union; however, the Court stated that "the pressure is no different from the pressure to join a majority party that persons in the minority always feel. Such pressure is inherent in our system of government; it does not create an unconstitutional inhibition on associational freedom." *Id.* at 290, 104 S.Ct. at 1069.[15]

Indeed, the Court has upheld the right of an association to choose its members in an even more compelling situation. In *Democratic Party v. Wisconsin*, 450 U.S. 107, 101 S.Ct. 1010, 67 L.Ed.2d 82 (1981), the Court rejected the idea that voters who desired to affirm Democratic party membership in secret (*i.e.*, instead of by open primary) in the presidential primary elections could compel the National Democratic Party to recognize their delegates. Wisconsin had a state statute that bound state Democratic delegates to vote according to results of an open

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[15]The present case is less problematic than the state statute in *Knight*. As Justices Brennan's and Stevens' dissents explained, the union context does not present concerns with academic freedom, *see* 465 U.S. at 296-97, 104 S.Ct. at 1072 (Brennan, J., dissenting), and the scope of exclusive representation by the union is confined, *id.* at 299-300, 104 S.Ct. at 1073-74 (Brennan, J., dissenting), *id.* at 301-304, 315-16, 104 S.Ct. at 1074-76, 1082 (Stevens, J., dissenting). Moreover, the union as the collective bargaining representative has a statutory duty of fair representation. *See id.* at 318-20, 104 S.Ct. at 1083-84 (Stevens, J., dissenting).

primary. The Democratic National Party refused to seat the delegates. The Court upheld the right of the National Party "'to identify the people who constitute the association, and to limit the association to those people only.'" *Id.* at 122, 101 S.Ct. at 1019 (citation omitted). The Court concluded that a "political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution." *Id.* at 124, 101 S.Ct. at 1020.

Moreover, in a society where many people are money conscious, in other words, known to free ride, an association could find itself practically bankrupt and powerless if it had to permit all members to opt out of payments. Almost fifty years ago, the Court wrote, "One would have to be blind to history to assert that trade unionism did not enhance and strengthen the right to work." *Hanson*, 351 U.S. at 235, 76 S.Ct. at 719-20. In the absence of more compelling interests, for example, the eradication of race or sex discrimination, we refuse to compel the union to admit as members those who choose to pay only for collective bargaining activities.[16]

III.

Kidwell and the other plaintiffs appeal from the district court's ruling regarding arbitrability and class certification.

A. *Standard of Chargeability and Escrow Verification*

The plaintiffs argue that the district court judge erred in refraining from ruling on two of their claims: (1) the decision about categories of chargeable expenditures and (2) the absence of an auditor to determine and verify escrow amounts because the plaintiffs had not first resorted to the arbitration process. The plaintiffs **[303]**contend that *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986),

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[16]Of course, we do not address whether the union may base membership on financial ability, rather than willingness, to pay.

does not require exhaustion by arbitration. With respect to the actual claims, the plaintiffs first argue that the union's legal definition of chargeable expenditures is constitutionally overbroad. They allege (1) that the union uses a forced "cross-bargaining unit subsidization" concept rather than basing the charges on the actual bargaining unit, and (2) that the union includes most lobbying costs. Second, they claim that the union's failure to have a certified public accountant verify the escrow amount violates *Hudson*.

The union replies that the notice on its face is not overbroad. Furthermore, the union contends that the district court correctly understood that the plaintiffs' real concern was with the fee calculation. The union argues that it provided the plaintiffs with the opportunity to have arbitration and the plaintiffs declined, thus the district court correctly found the challenge to fee calculation barred. The union also contends that since 1985 it has more than complied with constitutionally required procedures by escrowing all of the contested reduced fee paid.

In *Hudson*, the Court held that the union must "provide for a reasonably prompt decision by an impartial decisionmaker." 475 U.S. at 307, 106 S.Ct. at 1076. The Court gave two possibilities: (1) a state could choose "to provide extraordinarily swift judicial review for these challenges," *id.* at 308 n. 20, 106 S.Ct. at 1076 n. 20; or (2) the union could provide "an expeditious arbitration." *Id.* at 308 n. 21, 106 S.Ct. at 1077 n. 21. The Court added that the "arbitrator's decision would not receive preclusive effect in any subsequent § 1983 action." *Id.*

Recent appellate courts have sought to decide whether and when plaintiffs must exhaust union arbitration procedures before appealing to a federal court. In *Tierney v. City of Toledo*, 917 F.2d 927, 940 (6th Cir.1990), the court concluded that, as a general matter, exhaustion was not necessary before constitutional claims were brought in federal court but did not address the scope of "constitutional" claims. However, in *Hudson v. Chicago Teachers Union*, 922 F.2d 1306 (7th Cir.), *cert. denied*, — U.S. —, 111 S.Ct. 2852, 115 L.Ed.2d 1020 (1991), the court stated that judicial

review without prior arbitration was limited to ensuring that the proper procedure—fair share notice, an impartial decisionmaker to determine fee amount, and escrow protection—was followed. *Id.* at 1314. "[T]he singular role of the federal courts in reviewing the adequacy of fair share notice is to determine whether the notice gives the nonunion members enough information to challenge the basis for the fee." *Id.* It noted that, if the decision on fee calculation was adverse to the plaintiffs, they could seek review in the federal courts. *Id.* It refused to become involved in more specific determinations and micromanagement prior to arbitration. In *Dashiell*, the court did not address the exhaustion issue. Nevertheless, it seemed to be in accord with the Seventh Circuit by stating that the First Amendment

> requires only that the union disclose as part of its initial explanation to employees (1) such information that reveals to the employees major descriptive categories of expenses which will be assessed against the employees; (2) the component dollar amount of each category so chargeable; and (3) information to show that the financial figures have been verified by an independent auditor.

925 F.2d at 757.

We decline to decide the arbitration issue because even if the court had considered the claims, dismissal would have been proper. The notice of chargeable expenditures is not overbroad. It provides, "Objectors shall be charged for all activities germane to collective bargaining." The language parallels that in *Lehnert v. Ferris Faculty Ass'n*, — U.S. —, 111 S.Ct. 1950, 1957, 114 L.Ed.2d 572 (1991), and thus is permissible. Even the more specific standard found in Article 27 of the union's constitution, "All funds expended, directly or indirectly, on legislative activity not pertinent to the Union's role as bargaining representative," is not overbroad. *See* Art. 27 § 8(d) **[304]**(1986); Art. 27 § 3(d) (1988). Although in *Lehnert*, the Court held that the objectors to public sector unions could not be charged for "legislative lobbying or other political union activities outside the limited context of contract ratification or implementation," *id.*, 111 S.Ct.

at 1961, the Court's rationale was that connection between the challenged lobbying activities and "the union's function as bargaining representative is too attenuated...." *Id.* at 1959-60. Thus, the Court based its decision on *which* activities would qualify as related to the *function of bargaining representative*. Although after *Lehnert* the union may find it difficult to apply the standard to many lobbying costs, the union's use of the identical phrase in its standard is not overbroad.[17] Furthermore, contrary to the plaintiffs' contention of the problems with cross-subsidization, *Lehnert* found that "a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit." *Id.* at 1961. Thus, in this regard, the notice of chargeable activities also is not overbroad.

The plaintiffs further contend that the union violated *Hudson* by failing to have a certified public accountant verify the amount in escrow and certify that the only monies not in escrow were those that no objector could reasonably challenge. However, since 1985, the union has placed in escrow the entire amount of the reduced fee paid by an objector who seeks to challenge the amount. *Hudson* states, "If the Union chooses to escrow less than the entire amount, however, it must carefully justify the limited escrow on the basis of the independent audit, and the escrow figure must be independently verified." 475 U.S. at 310 n. 23, 106 S.Ct. at 1077 n. 23. Because the union has escrowed the entire amount, these further requirements are inapplicable. The union, of course, should provide notice of its

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[17]The plaintiffs also argue that the current Audit Protocol demonstrates that the union includes most lobbying costs. Although the union might be well advised to change the Protocol to more closely parallel the *Lehnert* opinion, the Protocol basically gives examples of expenses that the union believes might have a sufficient connection under the stated standard. We refuse to determine the legitimacy of hypothetical examples in the Audit Protocol.

procedures in this regard; however, the absence of any such notice has not harmed the plaintiffs.

B. *Class Certification*

The plaintiffs dispute the district court's denial of class certification to all objectors since 1985 and claim that they are suitable class representatives. The union responds by asserting that the plaintiffs only ultimately requested class certification as to their challenges to the union's filing requirements, no longer in effect. The union argues that no abuse of discretion occurred: (1) the claims were not typical because none of the plaintiffs' objections had been rejected for failure to comply with the filing requirements; (2) the filing requirement claims were moot prior to the resolution of the certification motion; (3) damages claims for moot issues must be brought under Fed.R.Civ.P. 23(b)(3); (4) class certification was not brought under 23(b)(3); and (5) even if it had been, certification would have constituted impermissible one-way intervention because the decision on the merits had already been rendered. The plaintiffs vigorously deny these allegations.

The district judge did certify a class of persons who can be represented by Kidwell in her position that union members should be allowed to object. However, the district judge denied a motion to amend the judgment to certify a larger class. The plaintiffs claimed that the suit was brought

> on behalf of themselves and all employees who have paid dues or fees pursuant to a [Union] collective bargaining agreement AND who advised [the Union] at any time since January 1, 1985, or will advise [the Union] in the future of their objection to the expenditure of a portion of dues or fees for political purposes or for any other purpose not part of the **[305]**statutory duties of an exclusive bargaining representative; or who requested or will request a rebate or reduction of dues or fees.

The district judge stated that the class projecting into the future was too indefinite and that "the named plaintiffs' factual circumstances are not representative, or even typical, of the circumstances of those whom they purport to represent." The judge also noted that some objecting employees, including all the plaintiffs, received a reduction, while others did not.

Admittedly, the trend is to give Rule 23 a liberal construction. *See In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir.1989). However, review of certification is under an abuse of discretion standard. *See Stott v. Haworth*, 916 F.2d 134, 139 (4th Cir.1990); *Zimmerman v. Bell*, 800 F.2d 386, 389 (4th Cir.1986). And we conclude that the district judge's ruling was not an abuse of discretion.

We find it unnecessary to address all of the plaintiffs' or the union's contentions because the plaintiffs have not met the "typicality" and "commonality" requirements of Rule 23. In this case, as in others, the commonality and typicality requirements merge. *See Stott*, 916 F.2d at 143. "'Both serve as guideposts for determining whether ... the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected....'" *Id.* (*quoting General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n. 13, 102 S.Ct. 2364, 2370 n. 13, 72 L.Ed.2d 740 (1982)).

The plaintiffs have not suffered any injury, never mind an injury similar to that of those whom they seek to represent. The plaintiffs claim that they have suffered "the injury of having monies taken from them, over their objections, in the absence of the procedural safeguards required by *Hudson*" and that the same injury accrues to all objectors. However, the district judge found that "the plaintiffs suffered no actual injury as a result of the invalid practices, which have since been eliminated." The judge denied the plaintiffs even the nominal damages of $1.00 for a denial of due process. The plaintiffs have not appealed that ruling.

The plaintiffs do not represent other objectors, some of whom also might have received a rebate, some of whom might not have, and some of whom might not even care to receive one. *See Adams v. Bethlehem Steel Corp.*, 736 F.2d 992, 994-95 (4th Cir.1984) (holding that the typicality and commonality requirements were not met merely by showing the "existence" of a wrong without an identifiable injury). The Seventh Circuit has cogently explained the dangers of class certification in a remarkably similar context:

> The district judge was right not to certify the suit as a class action on behalf of the 10,000 nonunion members. A potentially serious conflict of interest within the class precluded the named plaintiffs from representing the entire class adequately.... Two distinct types of employees will decline to join the union representing their bargaining unit. The first is the employee who is hostile to unions on political or ideological grounds. The second is the employee who is happy to be represented by a union but won't pay any more for that representation than he is forced to. The two types have potentially divergent aims. The first wants to weaken and if possible destroy the union; the second, a free rider, wants merely to shift as much of the cost of representation as possible to other workers, i.e., union members. The "restitution" remedy sought by the National Right to Work Legal Defense Foundation, which represents the nine named plaintiffs, is consistent with—and only with—the aims of the first type of employee.

*Gilpin v. AFSCME, AFL-CIO*, 875 F.2d 1310, 1313 (7th Cir.), *cert. denied*, 493 U.S. 917, 110 S.Ct. 278, 107 L.Ed.2d 258 (1989). The court upheld the district court's denial of class certification adding that the "National Right to Work Foundation is not an adequate litigation representative" for those "nonunion employees who, while not wanting to pay more (and perhaps even **[306]** wanting to pay less) than their 'fair share' fees, have no desire to ruin the union or impair its ability to represent them effectively...." *Id.*

We agree with the Seventh Circuit. The plaintiffs, once again represented by the National Right to Work Legal Defense Foundation, are not adequate representatives under Rule 23. The district court did not abuse his discretion.

The judgment is REVERSED as to whether a union member can object to paying the portion of union dues attributable to noncollective bargaining activities, and otherwise AFFIRMED.

REVERSED IN PART AND AFFIRMED IN PART.

# APPENDIX B

## OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

**February 27, 1990**

**[731 F. Supp. 192]**
**Kathryn A. KIDWELL, et al.**

**v.**

**TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION, et al.**

**Civ. No. PN-85-3804.**

United States District Court,
D. Maryland.

Feb. 27, 1990.

* * * *

[194]OPINION

NIEMEYER, District Judge.

The four plaintiffs, who are or have been railroad employees and who purport to represent others similarly situated, have sued the Transportation Communications International Union and two of its locals (collectively "the TCU" or "the Union"), complaining about the Union's expenditure of dues for purposes unrelated to collective bargaining and its method of reducing dues to non-union employees. The TCU is the collective bargaining representative under an agency shop relationship authorized by the Railway Labor Act, which permits railroad employees to be union members or not, but requires that all employees pay for the costs of collective bargaining. 45 U.S.C. § 152, Eleventh.

One plaintiff, Kathryn Kidwell, is a member of the Union and has objected on First Amendment grounds to the Union's expenditure of her dues on expenses unrelated to collective bargaining. The other three plaintiffs, Michael Coffman, Helen Eades, and Ramona Ellis, are not members of the Union, although Eades was a union member until she retired in 1988.

All plaintiffs challenge the methods used by the Union to account for and return dues that are attributable to expenditures unrelated to collective bargaining.

The parties have filed cross motions for summary judgment based on the record developed by discovery and have thoroughly re-briefed the issues in the light of Supreme Court cases that were decided since this action was filed.

For the reasons that are given hereafter, the Court concludes that the Union's use of Kidwell's dues over her objection for political or ideological purposes improperly infringes on her statutory and First Amendment rights. Her objection to the use of dues for other purposes unrelated to collective bargaining must be sustained as contrary to the Railway Labor Act. The remaining claims of the nonunion plaintiffs, challenging the method by which the Union accounts to them for expenditures unrelated to collective bargaining costs, are rejected seriatim on the merits or as moot.

## I. UNION-MEMBER DEMANDS FOR DUES REDUCTION

Kidwell, who is a member of the TCU, objects to having her union dues used for any purpose unrelated to collective bargaining. She demands the same reduction in dues that is afforded to nonunion employees of the railroad who object to the expenditure of dues by the Union for political causes. She works under a collective bargaining agreement negotiated between her employer, the National Railroad Passenger Corporation, and her bargaining representative, the Conrail System Board of Adjustment No. 86 of the TCU. This agreement provides for an agency shop, **[195]**which is a variation of the union shop arrangement permitted by the Railway Labor Act. Under an agency shop arrangement, all employees are required, as a condition of employment, to pay an initiation fee and dues to the union, but they need not actually become union members.

For the years 1985-88, Kidwell objected to the use of her money for purposes other than collective bargaining, and the TCU granted her a reduction on the same basis as was granted to nonunion members. In 1989, however, the TCU modified its constitution to prohibit the reduction to union members. With the change, an employee can object only if he or she gives up union membership.

Kidwell is unwilling to resign from the Union and continues to object to its use of her dues for purposes unrelated to collective bargaining. She contends that she is illegally presented with a dilemma. On the one hand, she can join the Union and be required to support political causes to which she is opposed, and on the other, she can withdraw from the Union to preserve her First Amendment rights, but forego the rights of union members to participate in shaping the terms and conditions of her employment. *Cf.* Comment, *The Regulation of Union Political Activity: Majority and Minority Rights and Remedies*, 126 U.Pa.L.Rev. 386, 419-20 (1977) (discussing analogous situation under the NLRA).

In 1951 Congress amended the Railway Labor Act to add § 2, Eleventh, which authorizes a union shop. 45 U.S.C. § 152, Eleventh. That provision provides in essential part that a labor organization authorized to represent employees is permitted "to make agreements, requiring, as a condition of continued employment that ... all employees shall become members of the labor organization representing their craft or class." This authorization is subject to the requirement that union membership not be discriminatory and that termination not be permitted except for "the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership." 45 U.S.C. § 152, Eleventh(a).

Confronted with the constitutionality of this union shop provision in *Railway Employes' Dept. v. Hanson*, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956), the Supreme Court acknowledged that the adoption by Congress of an act that estab-

lishes exclusive representation of employees in a craft or class by a single union and that permits the union to enter into an agreement for a union shop is governmental action which would be restricted by the First Amendment. The Court stated:

> If private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded. In other words, the federal statute is the source of the power and authority by which any private rights are lost or sacrificed. The enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction.

*Id.* at 232, 76 S.Ct. at 1798 (citations omitted). *See also Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 226, 97 S.Ct. 1782, 1794, 52 L.Ed.2d 261 (1977) (RLA authorization of union shop is governmental action); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 760, 81 S.Ct. 1784, 1795, 6 L.Ed.2d 1141 (1961) (Congress gave unions a role in effecting congressional policy).

Addressing the argument on the merits that a union shop agreement forces members into ideological and political associations that violate the Bill of Rights, the Court in *Hanson* concluded that it was within the power of Congress, in the exercise of its right to regulate commerce, to permit a union shop "as a stabilizing force." *Hanson*, 351 U.S. at 233, 76 S.Ct. at 1798. The Court noted that the Railway Labor Act, as amended in 1951, permissibly requires beneficiaries of trade unionism to contribute to the costs of collective bargaining. *Id.* at 233-35, 76 S.Ct. at 1798-99. "No more has been attempted here." *Id.* at 235, 76 S.Ct. at 1799. On that narrow **[196]**basis, the Court in *Hanson* rejected the constitutional challenge. If, however, an employee had been required to contribute to costs beyond those related to collective bargaining, the result could well have been different. This issue was expressly left open by the Court.

> The financial support required relates, therefore, to the work of the union in the realm of collective bargaining. No more precise allocation of union overhead to individual members seems to us to be necessary. The prohibition of "fines and penalties" precludes the imposition of financial burdens for disciplinary purposes. *If "assessments" are in fact imposed for purposes not germane to collective bargaining, a different problem would be presented.*

*Id.* (emphasis added) (footnote omitted).

The problem left open in *Hanson* was squarely presented in *International Ass'n of Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961), where employees of a railroad, who were represented by a machinist union by virtue of a union shop agreement entered into under the authority of the Railway Labor Act, objected to the use by the union of fees to finance campaigns of candidates for public office to whom the employees were opposed. Recognizing that the record in *Street* was fully adequate to test the constitutional question left open by *Hanson*, the Court nevertheless did not reach the constitutional issue. Rather, by relying on the legislative history of the Railway Labor Act, the Court concluded that the Act itself did not authorize the expenditures by the unions of monies on political causes because they were unrelated to collective bargaining.

> The conclusion to which this history [of the Railway Labor Act] clearly points is that § 2, Eleventh contemplated compulsory unionism to force employees to share the costs of negotiating and administering collective bargaining agreements, and the costs of the adjustment and settlement of disputes. One looks in vain for any suggestion that Congress also meant in § 2, Eleventh, to provide the unions with a means for forcing employees, over their objection, to support political causes which they oppose.

*Id.* at 763-64, 81 S.Ct. at 1797 (footnote omitted). Although the statute does not explicitly prohibit the expenditure by unions of expenses to support political causes, the Court concluded that

that was clearly the intent of Congress. The Court did not hold that unions could not engage in political action, but more narrowly, that it could not spend the "exacted money" of a dissenting employee. As the Court summarized:

> Our construction therefore involves no curtailment of the traditional political activities of the railroad unions. It means only that those unions must not support those activities, against the expressed wishes of a dissenting employee, with his exacted money.

*Id.* at 770, 81 S.Ct. at 1800. Mr. Justice Black, observing that the majority opinion carried the doctrine of avoiding constitutional questions "to a wholly unjustifiable extreme," *id.* at 784, 81 S.Ct. at 1807, dissented. He noted that the Railway Labor Act, by not expressly restricting the expenditures of the union, permitted the statute to be applied in violation of the First Amendment. He concluded that Section 2, Eleventh of the Railway Labor Act violated the First Amendment. *Id.* at 791, 81 S.Ct. at 1810.

Without taking the analysis any further, the *Street* case disposes of the issue raised by Kidwell in this case on the basis of statutory interpretation. The Court held that the Railway Labor Act, by not authorizing a union to use dues to support political causes, was by inference prohibiting it from doing so over the objection of employees without regard to their status as members of the union. If, however, the Railway Labor Act were to be construed on the basis of its plain statutory language, no prohibition could be discerned to preclude union expenditures for purposes that were properly voted on by a majority of the union. This would permit the expenditure of Kidwell's money to support political or ideological activity over which she objected and would render the statute in violation of **[197]**the First Amendment. In *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), and *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), the Court seemed to reach these conclusions that it refused to draw in *Street*. It rested its prohibition against the union expenditures on political causes, not on the implied prohibitions of the provisions

of the state statutes that were comparable to the Railway Labor Act, but on the First Amendment.

In response to the employees' argument in *Abood* that they could constitutionally prevent union expenditures of their required service fees on ideological causes, the Court agreed "this argument is a meritorious one." 431 U.S. at 234, 97 S.Ct. at 1799. The Court held:

> We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. Rather, *the Constitution requires* only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.

*Id.* at 235-36, 97 S.Ct. at 1799-1800 (emphasis added) (footnote omitted). Echoing this position in *Hudson*, the Court seemed to limit its statements in *Abood* to *nonunion* employees:

> We also held [in *Abood*], however, that nonunion employees do have a constitutional right to "prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." *Id.* at 234 [97 S.Ct. at 1799.]

475 U.S. at 301-02, 106 S.Ct. at 1073.

The TCU argues that the compulsion giving rise to a First Amendment violation is absent here because of the provisions of the agency shop agreement which permit Kidwell to withdraw from the union without losing her job. The TCU thus argues that a distinction can be made between union members and nonunion members in the agency shop context.

An agency shop is a form of union shop in the sense that all employees are required as a condition of employment to pay an initiation fee and dues to the union. But it varies from a pure union shop in the sense that all employees need not actually become union members. In *NLRB v. General Motors Corp.*, 373 U.S. 734, 83 S.Ct. 1453, 10 L.Ed.2d 670 (1963), the Supreme Court determined, under comparable union shop provisions of the Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. § 158(a)(3), that a company could not refuse to negotiate an agency shop arrangement because the essential purpose of the union shop to require all employees to pay for the benefits of unionism is satisfied by an agency shop arrangement.

> The agency shop arrangement proposed here removes that choice from the union and places the option of membership in the employee while still requiring the same monetary support as does the union shop. Such a difference between the union and agency shop may be of great importance in some contexts, but for present purposes it is more formal than real. To the extent that it has any significance at all it serves, rather than violates, the desire of Congress to reduce the evils of compulsory unionism while allowing financial support for the bargaining agent.

*Id.* at 744, 83 S.Ct. at 1460. The Court, however, did not address the consequence of an agency shop agreement which denies to the nonunion employee the right to vote on conditions of employment negotiated for that employee by the union.

The TCU argues that an employee in an agency shop has the choice of participating voluntarily as a union member. As a union member the employee has the right to vote for or against a political cause proposed by the union. If the employee does not wish to expose his or her dues to that democratic process, the employee may withdraw **[198]**without losing employment. As Justice Black noted in his dissent in *Street*, "[t]here is, of course, no constitutional reason why a union or other private group may not spend its funds for political or ideological causes if its members voluntarily join it and can voluntarily get out of it." 367

U.S. at 788, 81 S.Ct. at 1809 (Black, J., dissenting). The TCU thus urges that if Kidwell does not subscribe to the causes for which her dues are applied, she can, under the agency shop arrangement, withdraw from the union so long as she continues to pay the expenses allocated solely to collective bargaining. She does not lose her job and she reaps the benefits of collective bargaining by the Union.

At first blush, the argument is attractive in that membership in the politically oriented organization is voluntary and therefore not compelled. *See, e.g., DeMille v. American Fed'n of Radio Artists*, 31 Cal.2d 139, 187 P.2d 769 (1947), *cert. denied*, 333 U.S. 876, 68 S.Ct. 906, 92 L.Ed. 1152 (1948); L. Tribe, American Constitutional Law 805 n. 5 (2d ed. 1988). But this argument fails to treat fairly and legally the circumstances of Kidwell, who wants to participate in the collective bargaining process, which is delegated exclusively to the union, but who objects to supporting its political causes.

If Kidwell wishes to participate in the collective bargaining process, her money is utilized over her objection to support political causes to which she is opposed. If she withdraws from the union, the only avenue allowed to her for protecting her First Amendment rights, she is compelled to give up participation in the collective bargaining process. This is not a hollow privilege. She can no longer vote on the representatives who are given the exclusive right to negotiate her terms of employment; she can no longer participate in the resolution of disputes over conditions of employment; and perhaps most significantly, she cannot vote on the terms and conditions of employment that the Union representatives negotiate and to which she will be subjected. Without her input or vote she can be subjected to reductions in income, longer hours, rejection of an agreement which she personally approves, or even a strike. While she might not be bound by the strike, if one were voted, it could have the residual effect of putting her out of a job. In short, at the risk of stating the choice too simplistically, she is given the option of protecting free speech or of protecting her vote on the continuation or conditions of work, but not both. The importance of the conflicting

rights forces a choice not significantly more tolerable than the choice between conflicting constitutional rights. *Cf. Simmons v. United States*, 390 U.S. 377, 394, 88 S.Ct. 967, 976, 19 L.Ed.2d 1247 (1968) (intolerable to force criminal defendant to choose between Fourth and Fifth Amendment rights).

The compulsion of yielding interests so significant as the right to participate and the right to vote on one's conditions or continuation of employment is a burden that cannot be imposed on the exercise of First Amendment rights. Trade-unionism through a government imposed union shop, *even when limited to the collective bargaining function*, impinges on freedoms of association and speech, but these infringements are considered an acceptable balance for the industrial peace and economic stability that are achieved by the Railway Labor Act.

> To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests. An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative.... To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress.

*Abood*, 431 U.S. at 222, 97 S.Ct. at 1792 (footnote omitted). And again in *Ellis v.* **[199]***Railway Clerks*, 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984), the Court noted yet more directly,

> by allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights. The dissenting employee is forced to support financially an organization with whose principles and demands he

> may disagree.... It has long been settled that such interference with First Amendment rights is justified by the governmental interest in industrial peace.

*Id.* at 455-56, 104 S.Ct. at 1895-96. The infringements discussed by the Court in *Abood* and *Ellis* of necessity are bound up in the concepts of collective bargaining. When the union, however, strays from that charter given by the Railway Labor Act, *see Street,* 367 U.S. at 764, 81 S.Ct. at 1797, and uses dues to support candidates, religious beliefs, or any other ideological cause, it is not an answer to say to one who is opposed to those views, "leave the union." The union is the only vehicle through which the employee can participate in the terms of his or her employment. This Court concludes that in the context of governmental action that is imposed by the Railway Labor Act, the restriction on First Amendment freedoms must be drawn as narrowly as is consistent with the Congressional purpose in enacting the Railway Labor Act. As the Supreme Court in *Street* noted:

> One looks in vain for any suggestion that Congress also meant in § 2, Eleventh to provide the unions with a means for forcing employees, over their objection, to support political causes which they oppose.

*Id.* Nothing would preclude the union from pursuing political activity, so long as it afforded to those who opposed a reduction in dues without a diminishment of the right to participate in the collective bargaining process.

This result is compelled, whether it rests on the First Amendment, as discussed in *Abood* and *Hudson*, or on the statutory interpretation made in *Street*. Nowhere in *Street* did the Court indicate that union employees could be treated differently from nonunion employees with respect to exercising the right to object to the expenditure of exacted dues on political causes. Rather, the holding applies to *all* employees. *See* 367 U.S. at 768-69, 81 S.Ct. at 1799-1800. Moreover, the explicit provisions of the Railway Labor Act permit no such distinction.

Accordingly, the Court will require that Kidwell be given the right to a reduction of her dues to the extent they are expended for ideological causes to which she is opposed. Furthermore, under the holding of *Railway Clerks v. Allen*, 373 U.S. 113, 121-22, 83 S.Ct. 1158, 1163, 10 L.Ed.2d 235 (1963), and *Abood*, *supra*, she is also entitled to a reduction attributable to all union expenses unrelated to collective bargaining. *Allen*, 373 U.S. at 121, 122, 83 S.Ct. at 1163. *See also Ellis*, 466 U.S. at 447, 104 S.Ct. at 1891 (discussing *Allen* and *Abood*).

## II. DUES REDUCTION PROCEDURES

As already observed, although a union shop or agency shop agreement requires *every* employee to pay dues for the costs of collective bargaining, Section 2, Eleventh of the Railway Labor Act does not authorize a union to spend the money of employees for other purposes over their objection. *Ellis*, 466 U.S. at 446-47, 104 S.Ct. at 1891; *Allen*, 373 U.S. at 121-22, 83 S.Ct. at 1163; *Street*, 367 U.S. at 768-69, 81 S.Ct. at 1799-1800. In *Ellis* the Supreme Court fine-tuned the criteria for determining those expenditures that may be imposed. Beginning with the general principle that the union can collect dues to pay for expenses "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues," 466 U.S. at 448, 104 S.Ct. at 1892, the Court approved union assessments for expenses incurred for conventions, social activities, publications (in part), and litigation (in part) and disapproved union organizing expenses. *Id.* at 448-51, 104 S.Ct. at 1892-93. The Court also held that because First Amendment rights are implicated a "pure rebate ap**[200]**proach," by which the employee who paid full dues and later is paid a rebate for expenses unrelated to collective bargaining issues, is "inadequate." *Id.* at 443, 104 S.Ct. at 1889. The Court explained that "the union cannot be allowed to commit dissenters' funds to improper uses *even temporarily*." *Id.* at 444, 104 S.Ct. at 1890 (emphasis added).

In May 1986, after this case was instituted, the Supreme Court announced its decision in *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), which prescribed procedural safeguards that must be followed in reducing the dues of objecting employees. The Court ruled that the union must afford the employee the opportunity to participate in and object to the union's allocation of dues by (1) providing the employee advance information about the fee to be charged, (2) affording him a reasonably prompt opportunity to challenge the union's proposed fee before an impartial decision maker, and (3) retaining the disputed amount in an escrow account pending the decision by the impartial decision maker. *Id.* at 310, 106 S.Ct. at 1077.

Against the principles established by *Ellis* and *Hudson*, the plaintiffs challenge the procedures that were followed by the TCU before *Hudson* and the procedures that were adopted by the TCU since the filing of the complaint after the decision in *Hudson*. Because *Hudson* was decided after this suit was filed, the circumstances and positions of the parties have been shifting, requiring the Court to focus on what has been, essentially, a moving target.

As a general response to plaintiffs' challenges, the Union objects to the application of the standards established by *Hudson* to procedures that were in effect before *Hudson* was decided. It contends that this improperly applies the teachings of *Hudson* retroactively, citing *Lowary v. Lexington Local Bd. of Educ.*, 704 F.Supp. 1476 (N.D. Ohio 1988).

Cases are ordinarily decided in accordance with the law existing at the time of the decision, *see, e.g., Goodman v. Lukens Steel Co.*, 482 U.S. 656, 662, 107 S.Ct. 2617, 2621, 96 L.Ed.2d 572 (1987). In a limited set of circumstances, however, the retroactive application of a case, which the general principle embraces, is not appropriate. The Supreme Court explained in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), that three factors should be considered in determining whether its decisions should not be applied retroactively:

(1) whether the decision establishes a new principle of law, "either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression, whose resolution was not clearly foreshadowed;" (2) whether retroactive application furthers or retards the operation of the principle of law that is announced in the decision; and (3) whether retroactivity imposes inequity that would result in substantial injustice or hardship. *Id.* at 106-07, 92 S.Ct. at 355 (citations omitted). Thus, the need for imposing the principles established by the decision must be balanced against the surprise and hardship that retroactive application would effect.

Turning to *Hudson*, the decision neither overruled past precedent nor decided an issue of first impression "whose resolution was not clearly foreshadowed." *Chevron Oil*, 404 U.S. at 106, 92 S.Ct. at 355. The basic procedures explained in *Hudson* are that the union must provide to the employees an adequate explanation of the dues reduction prior to the time in which an objection may be filed; the employees must have an opportunity to challenge the fee calculation before an impartial decision maker; and an escrow account must be established to hold amounts reasonably in dispute pending a decision by the impartial decision maker. *Hudson*, 475 U.S. at 310, 106 S.Ct. at 1077. None of these procedural requirements are so radical that they can be said to be unforeseen. This is particularly compelling when considering that *Ellis*, which was decided in 1984 before this action was filed, ruled that the union cannot be allowed "to commit dissenters' funds to improper uses *even temporarily*," 466 U.S. at 444, 104 S.Ct. at 1890 (emphasis added), because acceptable alternatives, **[201]**such as the *advance reduction* of dues, could be implemented. The procedural requirements of *Hudson* merely describe measures that are necessary to protect the constitutional and statutory rights of employees that were announced earlier in *Street*, *Abood*, and *Ellis*. All of these cases were decided before suit was filed in the instant case.

Moreover, any time First Amendment rights are at issue, one should expect that stringent guidelines will be established to protect those rights. The Supreme Court emphasized in *Abood*

the importance of the First Amendment rights "by quoting the comments of Thomas Jefferson and James Madison about the tyrannical character of forcing an individual to contribute even 'three pence' for the 'propagation of opinions which he disbelieves.'" *Hudson*, 475 U.S. at 305, 106 S.Ct. at 1075 (*citing Abood*, 431 U.S. at 234-35, n. 31, 97 S.Ct. at 1799, n. 31).

The second and third factors listed in *Chevron Oil* for consideration do not, when applied here, suggest that *Hudson* should not be retroactively applied. The principles of *Hudson* are procedural, but they are important procedures to give effect to a line of decisions that reach back to *Street*, decided over 28 years ago. Their application does not work a hardship that could not have been reasonably foreseen.

Consequently, the *Hudson* procedural requirements will be applied to TCU's dues reduction policies that were in place prior to March 1986. *See Gilpin v. Am. Fed'n of State, County and Mun. Employees*, 643 F.Supp. 733, 738 (C.D.Ill.1986) (*Hudson* procedural requirements applied retroactively), *aff'd*, 875 F.2d 1310 (7th Cir.), *cert. denied*, — U.S. —, 110 S.Ct. 278, 107 L.Ed.2d 258 (1989); *Harrison v. Massachusetts Soc'y of Professors/Faculty Staff Union/MTA/NEA*, 405 Mass. 56, 537 N.E.2d 1237, 1241 n. 7 (1989).

Plaintiffs argue that TCU's dues reduction procedures have been and are currently defective in seven respects. *First*, adequate information was not provided in the years 1985-87 to employees *before* the 30-day window for filing objections to the Union's fee. *Second*, the chargeable and non-chargeable expenditures in 1985-87 were not verified by a certified public accountant. *Third*, the Union did not provide for advance reduction of dues until 1988. *Fourth*, the arbitration process used to resolve disputes about the dues reduction does not satisfy the requirement for an independent decision maker. *Fifth*, the amount held in escrow while disputes are resolved is inadequate. *Sixth*, the Union's objection procedures have been and are unnecessarily burdensome, and its policy in force in 1985 to strongly encourage rescission of objections was unconstitutional.

*Seventh*, the Union incorrectly classifies certain categories of expenditures as chargeable.

In addition to opposing most of these objections on the merits, the Union argues generally that plaintiffs should have exhausted existing arbitral procedures for resolving many of them. The Court will address each of the objections seriatim.

*Lack of advance information*

In the years 1985-87 employees were required to object to the allocation of expenses during the first 30 days of each calendar year. They did not, however, receive any information regarding the fees to be charged until May 1986 for the fees charged in 1985 and 1986, and until April 1987 for the 1987 fee.

In *Hudson*, the Supreme Court held that one constitutional requirement for collecting a fee is that an adequate explanation of the basis for the fee must be provided to the employee. *Hudson*, 475 U.S. at 306-07, 106 S.Ct. at 1075-76. The Court noted that "potential objectors [must] be given sufficient information to gauge the propriety of the union's fee," and that requiring employees to object in order to receive the information inadequately protects their rights. *Id.* at 306, 106 S.Ct. at 1075. Thus, *Hudson* clearly indicates that adequate information must be given to all employees *prior* to the period for objections so that the employees may then determine if they wish to file an objection with the union. *See Damiano v. Matish*, 830 F.2d 1363, **[202]** 1370 (6th Cir.1987); *Tierney v. City of Toledo*, 824 F.2d 1497, 1503 (6th Cir.1987).

Under these principles, the notice provided by the TCU to employees in the years 1985-87 was inadequate because it did not provide information before the employee had to object.

Since 1987 the Union has provided advance information to employees concerning the allocation between chargeable and non-chargeable expenditures and how the allocation was computed. The information is contained in an "audit protocol" that is

prepared following guidelines devised by Professor Roger Hartley of the Catholic University School of Law. This information, which is submitted to all nonunion employees in April of each year, provides sufficient information from which the employees may determine whether they wish to object.

Even though the TCU was not in compliance during the years 1985-87 when it was not providing timely information, the four plaintiffs here nevertheless objected each year. Because none of the plaintiffs were injured by the TCU's temporary failure, the issue is now moot.

*Verification by independent auditor*

Plaintiffs contend that the verification of expense categories for allocation purposes must be performed by a certified public accountant who is independent of the Union. They also contend that Professor Hartley, who makes the allocation decisions for the Union, is not independent and does not verify the expense categories.

*Hudson* states that "[t]he Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor." *Hudson*, 475 U.S. at 307 n. 18, 106 S.Ct. at 1076 n. 18. The Union argues that this requirement does not obligate the independent auditor to make the allocation decision between chargeable and nonchargeable expenditures. In this respect, defendant is correct. The purpose of the independent verification requirement is "to ensure that the expenditures which the union claims it made for certain expenses were actually made for those expenses." *Andrews v. Education Ass'n of Cheshire*, 829 F.2d 335, 340 (2d Cir.1987). The auditor is not required to decide the legal issue of what is chargeable and what is not.

On the challenge by plaintiffs to Professor Hartley's independence, the mere fact that he was chosen unilaterally by the TCU, or paid by the TCU, does not mean that he is not independent.

Even though the TCU now uses an accounting firm to verify its expenditures, it chooses the firm and pays for its services. These facts alone do not substantiate allegations of bias on the part of the accounting firm, nor do they cast doubt as to Professor Hartley's independence.

Nevertheless, the question remains whether Professor Hartley actually verified that "the expenditures which the union claims it made for certain expenses were actually made for those expenses." *Andrews*, 829 F.2d at 340. The typical audit protocol presented by this record, *see, e.g.*, Exhibit 25 to Declaration of Bobo, is not very helpful. It explains how the allocation decision was made by Professor Hartley, but it does not explain whether he verified that the claimed expenditures were made as claimed, even though the word "audit" is used liberally throughout the protocol. For example, with regard to operation expenses, the protocol explains "[t]he ratio for these expenditures was computed by auditing the Grand Lodge's ... financial records." Audit Protocol p. 2, Declaration of Bobo, Exhibit 25. This indicates how the ratio was computed but it does not assure employees that the financial records approximated reality. Nowhere is there any indication that Professor Hartley, whose calling is the law and not accounting, followed any accepted accounting principles. Significantly, the TCU does not argue in either its motion for summary judgment or its opposition to plaintiffs' motion that Professor Hartley actually verified the expenditures as a certified public accountant would have done and now does.

**[203]** All of the deficiencies that are now raised, however, were apparent on the face of the protocols when submitted, and the plaintiffs failed to make these objections at that time by following the available arbitral process. They in fact received the reductions in dues, which they accepted. Even today there is nothing in the record to suggest that a verification of the amounts contained in the protocols would produce a difference.

Because the plaintiffs did not resort to the arbitration process made available to them, the Court will refrain from considering these issues in this posture.

*Advance reduction and interest-bearing escrow account*

The plaintiffs have challenged the method by which the Union escrowed disputed fees. They argue that under *Ellis* the Union is not entitled to use disputed fees, *even temporarily*, and that therefore only an advance reduction of dues is permitted. In 1985, the Union maintained an interest-bearing account in which it deposited an amount equal to one and one-half times the previous year's nonchargeable total. In 1986 and 1987, an amount equal to twice the previous years' nonchargeable totals was placed in escrow for a portion of the year, while an advance reduction was provided for the remainder of the year. Since 1987 the advance reduction of dues has been provided to nonunion members who object during the 30-day window.

Plaintiffs argue that in order to comply with the restrictions of *Hudson* and *Ellis* that disputed dues not be used for *any period* of time, the Union should have reduced its dues in advance in each year since 1985, even though *Ellis* held open the possibility of using interest-bearing escrow accounts. 466 U.S. at 444, 104 S.Ct. at 1890. ("there are readily available alternatives [to a pure rebate system], such as advance reduction of dues, *and/or* interest-bearing escrow accounts" (emphasis added)). In support of their position, plaintiffs cite to the Court the decisions in *Damiano*, 830 F.2d at 1369-70 (6th Cir.1987), and *Tierney*, 824 F.2d at 1504.

The Third and Fourth Circuits, on the other hand, have rejected the position urged by plaintiffs even though they were decided before *Hudson*. *Robinson v. State of New Jersey*, 741 F.2d 598, 612 n. 12 (3rd Cir.1984), *cert. denied*, 469 U.S. 1228, 105 S.Ct. 1228, 84 L.Ed.2d 366 (1985), and *Beck v. Communications Workers of America*, 776 F.2d 1187, 1213 (4th Cir.1985), *reh'g en banc*, 800 F.2d 1280 (4th Cir.1986), *aff'd*, 487 U.S. 735, 108 S.Ct. 2641, 101 L.Ed.2d 634 (1988). Both of these cases relied on the Supreme Court's approval of interest-bearing escrow accounts in *Ellis*. After *Hudson* was decided, the Second Circuit approved a plan that provided an interest-bearing escrow

account instead of an advance reduction. *Andrews*, 829 F.2d at 338, 339.

The Court concludes that under the decisions in *Beck* and *Andrews*, the procedures used by the Union even in 1985 were proper. While it would have been arguably fair for the Union to escrow the actual dues reductions based on the fee charged by the Union in the previous year, the TCU in this case escrowed one and one-half times the nonchargeable amounts in 1985 and twice the amounts in 1986 and 1987. The amounts escrowed fairly and properly acted as a safeguard against the possibility of "temporary loans" by the objecting employees. Furthermore, *Hudson* did not overrule *Ellis* and hold that interest-bearing escrow accounts could not be used. The interest-bearing account satisfies the requirement that the Union not be given a loan, even temporarily, which may be used for non-collective bargaining purposes. Therefore, the Union's escrow policies that were in place in the years 1985-87 and which were replaced by the total advance reduction system, did not violate the principles of *Ellis* and *Hudson*.

*Independent decision maker*

Plaintiffs contend that the TCU did not provide a reasonably prompt opportunity for them to challenge the amount of its fee before an impartial decision maker. *See Hudson*, 475 U.S. at 307-08, 106 S.Ct. at 1076.

**[204]** While plaintiffs are not in a position to challenge the promptness of any decision regarding disputed fees, since they did not elect at any time to go through the arbitration process, they do challenge the independence of the arbitrators who are selected pursuant to the procedures established in 1986 by the American Arbitration Association ("AAA") from a preselected pool of labor arbitrators. Plaintiffs assert that the selection process is biased against employees and in favor of unions because the employees played no part in choosing the panel of qualified labor arbitrators from which individual arbitrators are selected, or the individual arbitrators themselves. The plaintiffs

also argue that the AAA is institutionally biased against employees because (1) the AAA's Board of Directors includes prominent union officials, (2) union lawyers helped create the AAA agency fee arbitration rules, and (3) unions had recommended certain arbitrators to serve on the panel of labor arbitrators.

In *Andrews*, 829 F.2d 335, the court upheld the constitutionality of this very process against similar attacks that union officials sat on the board of the AAA, union lawyers were involved in drafting the rules, the list of arbitrators had been limited by agreement between the union and the AAA, and even some of the arbitrators may have held a bias. Moreover, in this case none of the plaintiffs proceeded to arbitration, and their challenge at best is a generalized attack based on general claims of bias. The Sixth and Seventh Circuits have held that general allegations of the type presented here are insufficient to establish a bias by the AAA. *See Ping v. Nat'l Educ. Ass'n*, 870 F.2d 1369, 1373-74 (7th Cir.1989); *Damiano*, 830 F.2d at 1371-72 (6th Cir.1987).

The AAA is "undeniably separate" from any union, and its selection of an arbitrator does not represent the "unrestricted choice" of the union. *See Hudson*, 475 U.S. at 308 n. 21, 106 S.Ct. at 1077 n. 21. Absent evidence of "pecuniary interest or personalized animus," *Andrews*, 829 F.2d at 340, the use of the AAA and its selection of arbitrators does not violate the requirements specified in *Hudson*.

This ruling, however, does not foreclose a challenge at a later time that is based on actual bias in a particular case or a challenge made to a particular rule, when and if a plaintiff has pursued arbitration. At that time, for example, the AAA rule which allows the union to waive the oral hearing could be challenged. *See Andrews*, 829 F.2d at 341.

*Escrow amount*

In addition to challenging the use of escrow accounts, as discussed above, the plaintiffs challenge the amounts placed in escrow by the Union. Apparently, the challenge extends both to

the escrow account used from 1985-87 to hold a portion of the dues paid by objecting employees and the escrow account established in 1988 to hold amounts in dispute pending resolution of challenges to the allocation between chargeable and non-chargeable expenses. The defendants have labelled these separate escrow accounts "objector escrow" and "challenger escrow," respectively.

In the discussion, *supra*, the Court has already approved the adequacy of amounts placed in the objector escrow account. The amounts were established initially at one and one-half times the nonchargeable amount computed on the basis of the previous year's fees, and later at two times the amount.

As to the challenger escrow account, no plaintiff has ever challenged the fee reduction and therefore no plaintiff has been injured by a deficiency, if any, in the challenger escrow account. Consequently, no plaintiff has standing to challenge that escrow. *See Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984) (plaintiff must plead a distinct and palpable injury that is fairly traceable to defendant's alleged conduct).

Even if the plaintiffs had challenged the Union's fee, it would be difficult for the plaintiffs to establish any violation. *Hudson* requires the union to place in escrow the amount that is reasonably in dispute. 475 U.S. at 310, 106 S.Ct. at 1077. The TCU asserts, without dispute, that it **[205]**escrows the amounts reasonably in dispute. Moreover, the TCU Constitution currently provides that the challenger escrow amount is to be determined by a "neutral referee." Declaration of Bobo, Exhibit 53.

*Objection procedures and the "discouragement" policy*

Plaintiffs allege that defendants have imposed overly restrictive procedures on the right to object to the Union's proposed fee. They contend that the 30-day window for objecting is too narrow and that the requirements that objections be made by each individual employee and be renewed annually are too burdensome. They also challenge the procedure required in

earlier years that objections be mailed by certified mail and the policy pursued by the TCU in 1985 of discouraging objections.

The Court finds that the requirements for the annual renewal of objections and the 30-day window for making objections are not unduly restrictive of plaintiffs' rights. These are reasonable requirements of notice, since objections are not to be presumed on an on-going basis. The employee has the burden of notifying the union of his or her objection. *See Street*, 367 U.S. at 774, 81 S.Ct. at 1802 ("[D]issent is not to be presumed — it must affirmatively be made known to the union by the dissenting employee."). Moreover, an employee who previously objected may have a change of heart and choose not to exercise his or her right to object in future years. *See Tierney*, 824 F.2d at 1506 (annual objection requirement not unreasonable).

Similarly, the 30-day window for making objections is not unreasonable. As the Second Circuit held in *Andrews*, the union is not required to provide the least restrictive procedure imaginable. *Andrews*, 829 F.2d at 340. The union, as well as the employees, have an interest in the prompt resolution of obligations and disputes. The 30-day window facilitates prompt resolution and leaves no doubt as to the timing or the requirement for making an objection. *See Andrews*, 653 F.Supp. 1373, 1378 (D.Conn.) (approving 30-day objection period), *aff'd*, 829 F.2d 335 (2d Cir.1987).

Plaintiffs complain that the Union, at least in the past, would not permit objections to be mailed in the same envelope. While the requirement might be aimed at facilitating processing, the Court believes that any redeeming purpose is outweighed by the undue burden the requirement places on the exercise of an employee's rights. The requirement is no longer in place, and none of the plaintiffs' objections in the past were ever rejected for failure to comply with the individual mailing requirement.

Plaintiffs also complain about the past procedure requiring the use of certified mail. Again the purpose of assuring that objections are received is outweighed by the burden and cost to

the objector. But the TCU no longer requires this procedure and plaintiffs were reimbursed for the expense of certified mail.

With respect to both of these procedures, the issues are moot. There is no reasonable expectation that the requirements will be reestablished and their adverse effect has been suitably met by the Union. *See Matson Navigation Co. v. United States*, 825 F.2d 502, 503-04 (D.C.Cir.1987). Therefore, no relief need be afforded.

Finally, plaintiffs complain about a systematic program of harassment that was adopted in 1985 to encourage employees to rescind their objections. Under the program various Union officials sent letters to employees who had objected and made personal visits with them urging the employees to withdraw their objections. The Union does not deny the actions or the program, but it argues that the program did not encompass harassment and was not unconstitutional.

Although the Union has the responsibility to provide procedures that enable the employee to exercise statutory and First Amendment rights, *Hudson*, 475 U.S. at 307 n. 20, 106 S.Ct. at 1076 n. 20, it is likewise permitted to express views and engage in a dialogue on the merits of union membership. In balancing its obligation to preserve the rights of employees and exercising its own First Amendment rights, the Union must separate its propaganda mech[**206**]anisms from the procedures designed to assure employees free exercise of their rights so as not to undermine or unduly burden the mechanisms. Moreover, it cannot "chill" First Amendment rights by any means that incorporate the use of threats, harassment or reprisals to individual employees. *Master Printers of America v. Donovan*, 751 F.2d 700, 704 (4th Cir.1984), *cert. denied*, 474 U.S. 818, 106 S.Ct. 63, 88 L.Ed.2d 52 (1985).

Samples of the Union's letters submitted by the plaintiffs were certainly forceful in their encouragement of rescinding objections. They did not, however, threaten anyone with reprisals

or harassment. The fact that there were a number of letters is not of itself threatening or harassing.

With respect to the "one on one" visits by Union officials to objecting employees, plaintiffs have not submitted any specifics beyond the general allegations in the pleadings to establish harassment. There are no exhibits, affidavits, or depositions indicating that any of the individual plaintiffs were threatened with reprisals or otherwise harassed. In the absence of such support, summary judgment will be entered in favor of the Union on this issue. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

*Specific categories of expenditures*

Although plaintiffs attack three categories of expenditures that are currently classified by the Union as part of the cost of collective bargaining, none of them resorted to the arbitration procedures that were established pursuant to *Hudson* to pursue such a challenge. *See Hudson*, 475 U.S. at 311, 106 S.Ct. at 1078 (White, J., concurring) ("[I]f the union provides for arbitration and complies with the other requirements specified in our opinion, it should be entitled to insist that the arbitration procedure be exhausted before resorting to the courts."). Even though plaintiffs assert that they are not challenging the amount, only the classifications of expenditures, the arbitration process is the appropriate route for raising these issues since they are inextricably intertwined. Therefore, the Court will refrain from ruling on these particular objections voiced by plaintiffs.

It may be observed, however, that each of the categories challenged has been addressed by courts previously. The plaintiffs' challenge to agency fees on collective bargaining efforts by units other than those to which plaintiffs belonged is undermined by the discussions in the various opinions in *Beck v. Communication Workers of America*, 776 F.2d 1187, 1210-13 (4th Cir.1985), *reh'g en banc*, 800 F.2d 1280 (4th Cir.1986), *aff'd*, 487 U.S. 735, 108 S.Ct. 2641, 101 L.Ed.2d 634 (1988). *Cf. Ellis*, 466 U.S. at 448-50, 104 S.Ct. at 1892-93 (approving fees for *national*

conventions and social activities of the *national* union). However, the plaintiffs' challenge to lobbying expenses of the Union finds support in the discussion in *Beck*, 776 F.2d at 1210-11. *But compare, Lehnert v. Ferris Faculty Ass'n*, 881 F.2d 1388, 1392 (6th Cir.1989) (lobbying expenses are chargeable to public-sector employees because of the unique relationship of public employees' working conditions to legislation); *Robinson v. New Jersey*, 741 F.2d at 609 (same). Finally, the plaintiffs' challenge to publication costs will depend on whether the substance of the publication falls within the scope of matters needed to carry out effectively the collective bargaining responsibility. *See Ellis*, 466 U.S. at 451, 104 S.Ct. at 1893.

## III. DUTY OF FAIR REPRESENTATION

Plaintiffs rest their challenge to the dues reduction procedures of the Union not only on constitutional and statutory grounds but also on the contention that the procedures violate the Union's duty of fair representation. Both parties have given this issue only cursory treatment in their papers and at oral argument. The Court will nevertheless address the contention briefly as it is raised in Count III of the complaint.

A union's duty of fair representation derives from the union's position as the exclusive bargaining representative for the employees. *See Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192, 207, 65 **[207]**S.Ct. 226, 234, 89 L.Ed. 173 (1944). Under this duty, the exclusive bargaining representative must serve the interests of all employees covered by the collective bargaining agreement, whether or not they are union members. In doing so, the union must act in good faith and honesty, while avoiding arbitrary or discriminatory conduct. *Vaca v. Sipes*, 386 U.S. 171, 177, 190, 87 S.Ct. 903, 909, 916, 17 L.Ed.2d 842 (1967).

The current dues reduction procedures employed by the TCU do not violate the duty of fair representation. Nonunion members are provided with an adequate explanation of the Union's fee; the calculation is verified by an independent

auditor; an opportunity is provided, within a reasonably prompt time, to challenge the fee calculation before an impartial decision maker; and an escrow account is established to hold the amounts reasonably in dispute pending a decision by the impartial arbiter. In providing for these procedures, the Union has not acted arbitrarily, in bad faith, or in a discriminatory manner toward any of the nonunion employees.

Procedures used in previous years have, in some instances, been found to be improper as discussed earlier in this Opinion. To the extent that these improper procedures violate a duty of fair representation, any remedy is precluded for the reasons described above.

## IV. CONCLUSION

For the reasons given in this Opinion, the cross motions for summary judgment will be granted in part and denied in part, as follows:

1. The motion of plaintiffs for summary judgment will be granted to the extent that the TCU shall afford to Kidwell and others similarly situated the right to object and receive a reduction in dues to the same extent and in the same manner as afforded to nonunion employees. In all other respects, the motion will be denied.

2. The motion of the TCU for summary judgment will be granted, except as provided in paragraph one.

A separate Order entering judgment as provided in this Opinion will be entered.

# APPENDIX C

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## JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

**February 27, 1990**

---

**[Clerk's stamp omitted in printing]**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| KATHRYN A. KIDWELL, et al. | * | |
| v. | * | CIVIL NO. PN-85-3804 |
| TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION, et al. | * | |

JUDGMENT

For the reasons given in the Opinion of this date, it is ORDERED this 27th day of February, 1990, that:

1. The motion of plaintiffs for summary judgment is granted to the extent that the TCU shall afford to Kidwell and others similarly situated the right to object and receive a reduction in dues to the same extent and in the same manner as afforded to nonunion employees. In all other respects, the motion is denied.

2. The motion of the defendants for summary judgment is granted except to the extent provided in paragraph 1.

3. Each party shall bear its own costs.

4. The Clerk shall mail a copy of this Judgment, and the Opinion supporting it, to all counsel of record and close this case.

/s/
Paul V. Niemeyer
United States District Judge

# APPENDIX D

## MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

October 19, 1990

**[Clerk's stamp omitted in printing — Filed Oct. 22, 1990; Entered Oct. 25, 1990]**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| KATHRYN A. KIDWELL, et al. | * | |
| v. | * | CIVIL NO. PN-85-3804 |
| TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION, et al. | * | |

MEMORANDUM AND ORDER

On February 27, 1990, this Court issued an opinion and entered judgment in this case, *Kidwell v. Transp. Communications Int'l Union*, 731 F.Supp. 192 (D. Md. 1990). The Court held that under a union security agreement, authorized by the Railway Labor Act (RLA), 45 U.S.C. § 152, Eleventh, the Union must provide to its members the opportunity to object to the expenditure of union dues or fees for purposes unrelated to collective bargaining. Those employees who do object are entitled to a reduction in their dues or fees corresponding to that portion which is allocated to non-collective bargaining purposes. *Id.* at 194-99. In addition, the Court rejected challenges by the plaintiffs to the method by which the Union accounts for expenditures unrelated to collective bargaining. Both the plaintiffs and the Union have filed motions to alter or amend the judgment. The Union takes issue with the requirement of providing dues reductions to union members on the same basis as non-union employees. The plaintiffs wish to certify the case as a class action suit pursuant to Fed. R. Civ. P. 23(b)(1)(A) or

(b)(2). For the reasons given below, the Court will deny the Union's motion and will grant, in part, the motion of the plaintiffs.

I.

In their papers the parties, through differing analyses, seek refuge in the recent opinion of the Supreme Court in *Austin v. Michigan Chamber of Commerce*, __ U.S. __, 110 S. Ct. 1391 (1990). In *Austin*, the Michigan State Chamber of Commerce challenged the constitutionality of a state law which prohibits corporations from using general treasury funds to make political contributions. They are entitled to make such contributions only from funds segregated solely for political purposes. The Supreme Court held that even though the law represents a burden on the plaintiff's First Amendment rights, it is narrowly tailored to serve a compelling state interest. *Id.* at __, 110 S. Ct. at 1397-98.

A proper reading of *Austin* reveals that it does not stand for the proposition, argued by the Union, that Kidwell's RLA and Constitutional rights are satisfied by the fact that she may simply resign from the Union, without fear of losing her job, if she wishes to object to the expenditure of her exacted fees for purposes not related to collective bargaining. The economic disincentives recognized in *Austin* are similar to those felt by Kidwell and other union members. Actual membership in the Union under a union security agreement is not "voluntary" because strong economic disincentives exist for withdrawing as a member. By resigning from the union, employees surrender the ability to participate in shaping the terms and conditions of their employment. *Kidwell*, 731 F. Supp. at 198. It is true that an employee for whom the Union serves as the exclusive bargaining representative "need not become a[n actual union] member ... to earn a living." *Austin*, __ U.S. at __, 110 S. Ct. at 1399. Nevertheless, the involuntariness of the union security arrangement, coupled with the economic disincentives to resigning from the union, which have been enumerated, see *Kidwell*, *supra*, serves as a significant damper on the right of the employees not to

associate with the political expressions and views of the Union. This damper effect violates the union members' rights under the RLA and the Constitution. *See Kidwell*, 731 F. Supp. at 196-99.

The Union contends, however, that *Austin* does not support this Court's holding in *Kidwell* because the Supreme Court was only referring to membership in the agency shop context when it discussed the differences between corporations and unions. *See Austin*, __ U.S. at __, 110 S. Ct. at 1400. Under an agency shop arrangement, employees must contribute to their fair share of the costs of collective bargaining but they need not become full-fledged members of a union in order to enjoy the benefits of collective bargaining. *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963). This Court, however, recognized that an agency shop, "[t]o the extent that it has any significance at all[,] ... serves, rather than violates, the desire of Congress to reduce the evils of compulsory unionism while allowing financial support for the bargaining agent." *Kidwell*, 731 F. Supp. at 197-98 (quoting *General Motors*, 373 U.S. at 744). There is, however, no indication in *General Motors* that an agency shop arrangement represents the limits of protections provided to employees by Congress under the RLA.

The Union also contends that this Court erred because the Supreme Court's decisions in *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944), *Minnesota Bd. for Community Colleges v. Knight*, 465 U.S. 271 (1984), and *United Steelworkers of America, AFL-CIO-CLC v. Sadlowski*, 457 U.S. 102 (1982), "make it ... plain that the right to participate in the selection of the collective bargaining representative and the right to fair representation fully vindicate the constitutional rights of represented employees." Memorandum in Support of Defendants' Motion to Alter or Amend at 4. In *Steele*, the Court dealt with the union's duty to represent fairly all employees in a bargaining unit. The Court there was not confronted with the issue of whether, under a union security agreement in which financial contributions are compelled to cover the costs of collective bargaining, the union may also require its members to support financially its political goals. Indeed, at the time *Steele* was

decided in 1944, union security agreements were not authorized under the RLA, for the enabling provision, Section 2, Eleventh, was not enacted for another seven years.

Similarly, this Court's ruling does not run afoul of *Knight* or *Sadlowski*. In *Knight*, the Court upheld a law which provided for an exclusive representative for public employees on employment-related matters. The plaintiffs, who were not members of the organization which served as the exclusive representative, argued that the law was unconstitutional because it prevented them from conferring directly with their public employer. The Court rejected the argument, holding that the plaintiffs had "no constitutional right to force the government to listen to their views." *Knight*, 465 U.S. at 283. There was no discussion in *Knight* of whether the exclusive representative could use the employees' dues or fees for purposes not related to collective bargaining.

The *Sadlowski* case also provides no support for the Union. There, the Court decided that the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 411, was not violated by a union rule which prohibited union officials from accepting campaign contributions from non-union individuals. The Court held that the LMRDA provision was not as strict as the First Amendment, *Sadlowski*, 457 U.S. at 111, which was not at issue in the case because there was no state action. *Id.* at 121 n.16.

Finally, the Union argues that the Court's ruling "grants employees a right to participate as members in the affairs of their exclusive representative on terms other than those provided in the union's constitution." The Union suggests that, taking the reasoning to its logical end, "a union would be forced to admit members who refused to pay full dues even where no union security agreement is in effect, because the union would still be the employees' exclusive representative." Defendants' Memorandum at 6 n.2. The Union's argument, however, misinterprets the Court's conclusions and analysis. The Court narrowly prohibits the Union in the context of the circumstances in this case from

collecting fees from objecting members for use in support of political or other ideological causes to which they were opposed.

Nothing has been presented in defendants' motion that has not properly been addressed in the Court's original opinion. For these reasons, their motion to alter or amend will be denied.

II.

The plaintiffs ask the Court to certify the case as a class action pursuant to Fed. R. Civ. P. 23(b)(1)(A) or (b)(2) and to amend the judgment to provide a remedy to the class members who are included.

The plaintiffs alleged that the suit was brought

> on behalf of themselves and all employees who have paid dues or fees pursuant to a [Union] collective bargaining agreement AND who advised [the Union] at any time since January 1, 1985, or will advise [the Union] in the future of their objection to the expenditure of a portion of dues or fees for political purposes or for any other purpose not part of the statutory duties of an exclusive bargaining representative; or who requested or will request a rebate or reduction of dues or fees.

Amended Complaint ¶ 10 (filed May 15, 1989). The plaintiffs, on behalf of the class, seek to require the Union: (1) to afford to Union members the opportunity to object and receive a reduction in dues for all years beginning with 1989; (2) to give to all class members, who did not object in any of the years from 1985-87, proper notice and an opportunity to object and receive a reduction in dues; (3) to provide to class members, whose objections were rejected on grounds that they were not submitted separately and/or by certified mail, reductions (rebates with interest) in dues or fees; and (4) to award nominal damages to all plaintiffs and class members for the years 1985-88 and to Union members for the year 1989.

The defendants raise numerous problems with class certification with which the Court agrees for the most part. A class of persons which projects into the future to include persons who may or may not object is too indefinite for certification. In addition, the named plaintiffs' factual circumstances are not representative, or even typical, of the circumstances of those whom they purport to represent. "[A] class representative must be part of the class and 'possess the same interest and *suffer the same injury*' as the class members." *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 156 (1982) (citation omitted, emphasis added). In this case, however, some of the employees who objected, including all of the plaintiffs, received a reduction in each year that they objected. Other objectors, on the other hand, received no reduction.

While the request for a class action will be denied generally, the Court will certify a limited subclass to give effect to its ruling. Kidwell is entitled to represent all persons who have been Union members since the Union modified its Constitution in 1989 *and* (1) who were not advised of the right to object to the expenditure of dues for matters other than expenses incurred in connection with collective bargaining *or* (2) who objected but were not granted reductions as provided in the Court's opinion. This limited subclass will be certified under F. R. Civ. P. 23(b)(2).

III.

Finally, the plaintiffs have requested an award of nominal damages for the plaintiffs because the Union did not provide adequate advance information prior to the objection period in the years 1985-87 and because of the invalid policy of requiring objections to be submitted via individual envelopes and certified mail. The plaintiffs also seek nominal damages for Union members who were denied an opportunity to object in 1989. This Court held that the plaintiffs suffered no actual injury as a result of the invalid practices, which have since been eliminated. The plaintiffs rely, however, on *Carey v. Piphus*, 435 U.S. 247 (1978), a case brought under 42 U.S.C. § 1983 where the Supreme Court

held that the denial of due process was "actionable for nominal damages without proof of actual injury." *Id.* at 266. Thus, the Court there stated that even if a plaintiff's substantive rights were not violated, he would be "entitled to recover nominal damages not to exceed one dollar" as a result of the deprivation of his procedural due process right. *Id.* at 267.

Refining the holding of *Carey*, the Fourth Circuit has ruled that an award of nominal damages is not always mandatory for violations of procedural due process. *Ganey v. Edwards*, 759 F.2d 337, 339 (4th Cir. 1985). In *Ganey*, a prisoner brought an action under 42 U.S.C. § 1983 against his warden. The jury found that the warden had denied Ganey adequate means of access to the prison library or to other means of access to the courts but declined to award any damages to Ganey, either actual or nominal. *Id.* at 338. The Fourth Circuit affirmed the district court's denial of Ganey's motion for j.n.o.v on the issue of nominal damages, and agreed with the warden's argument that "the amount of nominal damages is a question of fact and the jury's finding of no damages need not be reversed." *Id.* at 339. The court declined to interpret *Carey* as requiring an award of nominal damages in every instance of a procedural due process violation. *Id.* at 340.

In this case, the plaintiffs did not request a jury trial and this Court, as the factfinder, finds that an award of nominal damages is not necessary. An award of $1.00 is not essential to the Court's finding that the Union imposed some invalid requirements for filing an objection in the years 1985-88. Beyond its symbolic value, an award of nominal damages has no significant legal consequence. *See Ganey*, 759 F.2d at 340. The Court, therefore, will deny the plaintiffs' request for an award of nominal damages.

A separate Order and Revised Judgment will be entered giving effect to this Opinion.

/s/ Paul V. Niemeyer
United States Circuit Judge
sitting by designation

Dated: October 19, 1990

# APPENDIX E

## ORDER AND AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

October 19, 1990

**[Clerk's stamp omitted in printing — Filed Oct. 22, 1990; Entered Nov. 7, 1990]**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| KATHRYN A. KIDWELL, et al. | * | |
| v. | * | CIVIL NO. PN-85-3804 |
| TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION, et al. | * | |

ORDER AND AMENDED JUDGMENT

For the reasons given in the opinion of this date, it is hereby ORDERED this 19th day of October, 1990, that:

1. The defendants' motion to alter or amend the judgment is denied.

2. The plaintiffs' motion to alter or amend the judgment is granted in part to certify a class as defined herein and in all other respects is denied.

3. The Court certifies a class, pursuant to F. R. Civ. P. 23(b)(2), to be represented by Kidwell and which shall consist of members of the Union since the Union modified its Constitution in 1989 who: (1) were not advised of the right to object to the expenditure of dues for matters other than expenses incurred in connection with collective bargaining, or (2) objected but were not granted reductions as provided in the Court's opinion of February 27, 1990.

4. The motion of plaintiffs for summary judgment is granted to the extent that the Union shall afford to Kidwell and

other members of the class the right to object and receive a reduction in dues to the same extent and in the same manner as afforded to nonunion employees. In all other respects the motion is denied.

5. The motion of the defendants for summary judgment is granted except to the extent provided in paragraph 4.

6. Each party shall bear its own costs in this action.

7. The Clerk is directed to mail a copy of this Order and Revised Judgment, and the Opinion of this date, to all counsel of record and close this case.

/s/ Paul V. Niemeyer
United States Circuit Judge
sitting by designation

# APPENDIX F

## ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING REHEARING

November 21, 1991

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
November 21, 1991

No. 90-2511
CA-85-3804

KATHRYN A. KIDWELL; MICHAEL S. COFFMAN; HELEN EADES; RAMONA J. ELLIS

Plaintiffs - Appellees

v.

TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION; TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION, Con-Rail System Board of Adjustment No. 86; TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION, Seaboard System Board of Adjustment No. 3

Defendants - Appellants

No. 90-2512
CA-85-3804-PN

KATHRYN A. KIDWELL; MICHAEL S. COFFMAN; HELEN EADES; RAMONA J. ELLIS

Plaintiffs - Appellants

v.

TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION; TRANSPORTATION COMMUNICATIONS

INTERNATIONAL UNION, Con-Rail System Board of Adjustment No. 86; TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION, Seaboard System Board of Adjustment No. 3

Defendants - Appellees

---

On Petition for Rehearing with
Suggestion for Rehearing In Banc

---

Appellees/cross-appellants filed a petition for rehearing with suggestion for rehearing en banc. A member of the Court requested a poll on the suggestion for rehearing en banc, and a majority of the judges voted to deny rehearing en banc. Judges Russell, Widener, Wilkinson, Wilkins, and Hamilton voted to rehear the case en banc, and Chief Judge Ervin and Judges Hall, Phillips, Murnaghan, Sprouse and Luttig voted against rehearing in banc. Judges Russell and Widener dissent from the denial of rehearing en banc. Judge Niemeyer has recused himself.

The original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing en banc.

Entered at the direction of Judge Murnaghan, with the concurrence of Chief Judge Ervin and Judge Phillips.

For the Court,

JOHN M. GREACEN
CLERK

# APPENDIX F

## ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING REHEARING

November 21, 1991

**[Heading omitted in printing]**

File: ST - 315

Subject: Changes in Article 27
of the Grand Lodge Constitution

January 1989

Dear Member:

This is in response to your letter concerning a refund of dues expended on activities deemed not germane to collective bargaining.

Because of several significant legal developments affecting the status of Rebate Plans, TCU has revised its procedures for objecting to expenditures not germane to collective bargaining so as to permit only non-member agency fee payers to file objections. Agency fee payers are employes who meet their financial obligations by paying all dues, fees and assessments, but elect not to become actual members of the Union. They are eligible for all economic benefit programs, including strike benefits, death benefits and disaster relief. However, they are not eligible to attend lodge or membership meetings, run for union office, participate in the election of union officers, contract ratifications, and are not counted toward Convention delegate strength.

Our records indicate that you are a member. If you wish to forfeit the rights of membership and become an agency fee payer, you may resign by individually notifying the International Secretary-Treasurer at the following address:

Mr. D.A. Bobo
International Secretary-Treasurer
3 Research Place
Rockville, Maryland 20850

Sincerely and fraternally,
/s/
International Secretary-Treasurer

DAB 19/js

# AMICUS CURIAE

# BRIEF

Supreme Court, U.S.
FILED
MAR 20 1992
OFFICE OF THE CLERK

(2)

No. 91-1344

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

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KATHRYN A. KIDWELL; MICHAEL S. COFFMAN;
HELEN EADES; RAMONA J. ELLIS,

*Petitioners*,

v.

TRANSPORTATION COMMUNICATIONS INTERNATIONAL
UNION, *et al.*,

*Respondents*.

---

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

---

## BRIEF *AMICUS CURIAE* OF NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC., IN SUPPORT OF KIDWELL, *et al.*'s PETITION FOR A WRIT OF CERTIORARI

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*National Right to Work Legal Defense and Education Foundation, Inc.*

March 20, 1992

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

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No. 91-1344

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KATHRYN A. KIDWELL; MICHAEL S. COFFMAN;
HELEN EADES; RAMONA J. ELLIS,

*Petitioners*,

v.

TRANSPORTATION COMMUNICATIONS INTERNATIONAL
UNION, *et al.*,

*Respondents*.

---

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

---

# BRIEF *AMICUS CURIAE* OF NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC., IN SUPPORT OF KIDWELL, *et al.*'s PETITION FOR A WRIT OF CERTIORARI

---

## INTRODUCTION

The National Right to Work Legal Defense and Education Foundation, Inc. (hereafter "Foundation") files this brief *amicus curiae*, pursuant to Sup. Ct. R. 37.2, in support of Kathryn A. Kidwell, *et al.'s* (hereafter "Kidwell" or the "Employees") Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit (hereafter "Petition"). All of the parties have consented to the filing of this brief *amicus curiae*, and their letters of consent have been filed with the Clerk.

## INTEREST OF THE *AMICUS CURIAE*

The National Right to Work Legal Defense Foundation is a nonprofit, charitable organization formed to provide free legal assistance to individual employees who, as a consequence of their subjection to compulsory unionism arrangements, have suffered violations of their right to work; freedoms of association, speech, and religion; rights to due process of law; and other legal rights and fundamental liberties guaranteed by the Constitution and laws of the United States and of the Several States.

To this end, the Foundation has supported the most recent major cases involving the right of employees to refrain from joining or supporting labor organizations.[1] In hundreds of cases throughout the country, the Foundation is now aiding employees who are seeking to enforce their right to limit their forced association with a labor organization as a condition of employment.

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[1] *E.g.*, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Ellis v. BRAC*, 466 U.S. 435 (1984); *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271 (1984); *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986); *Communications Workers v. Beck*, 487 U.S. 735 (1988); and *Lehnert v. Ferris Faculty Ass'n*, __ U.S. __, 111 S. Ct. 1950 (1991).

The Foundation is concerned with this case, first, because in the final holding of its October 3, 1991 Opinion (Appendix A to the Petition, hereafter "Pet. App.," at 41a-44a), the Fourth Circuit panel erroneously purported to exercise jurisdiction over the *amicus curiae*, the Foundation, which is *not* a party to this action and which is *not* the legal representative of any party, and erroneously made an adverse determination concerning the Foundation without any record supporting the panel's views and without any notice or opportunity for a hearing provided to the Foundation.

Second, the panel's decision threatens to hamper the ability of civil rights litigants to obtain meaningful access to the courts by applying a "guilt-by-association" rule to individuals seeking to be certified as class representatives pursuant to Fed. R. Civ. P. 23. In this case, the panel denied the Employees class representative status *because of their association* with the Foundation.

The panel's decision seriously threatens the assistance programs of all members of the legal aid community that support litigation as an exercise of First Amendment rights. As a member of that legal aid community, the Foundation has a perspective to offer different from that of the parties.

This brief *amicus curiae* is intended to bring to the Court's attention these and other matters which the Foundation believes are relevant to the Court's consideration of Kidwell's Petition.

## SUMMARY OF THE ARGUMENT

This case is of enormous importance to the legal aid community that supports litigation as an exercise of the First Amendment right to associate for the promotion of causes. The Fourth Circuit panel has applied a "guilt-by-association" rule to individuals seeking to be certified as class representatives pursuant to Fed. R. Civ. P. 23, and has denied those individuals class representative status *because of their association* with such a legal aid organization, i.e., the Foundation.

The panel's decision threatens to severely hamper the ability of civil rights litigants to obtain meaningful access to the courts and to obtain class-wide relief for violations of their constitutional and statutory claims. Henceforth, civil rights defendants will pursue the "divide and conquer" approach. They will try to probe the ideological beliefs of the civil rights litigants, of the organizations supporting them, and even of potential class members in an effort to show a variety of beliefs. They will then attempt to use that information to break up the proposed class and deny certification to some or all of the various belief-groupings of the class. The result will be the evisceration of civil rights class action litigation.

Furthermore, in the final holding of its October 3, 1991 Opinion (Pet. App. A at 41a-44a), the Fourth Circuit panel erroneously purported to exercise jurisdiction over the *amicus curiae*, the Foundation, which is *not* a party to this action and which is *not* the legal representative of any party, and erroneously made an adverse determination concerning the Foundation without any record supporting the panel's views and without any notice or opportunity for a hearing provided to the Foundation.

Thus, in addition to any issues presented by the parties, the panel's adverse decision with respect to the Foundation: (1) violates Article III, Section 2, Clause 1 of the United States Constitution because there was no case or controversy before the court between the Foundation and any party; (2) denies the Foundation due process of law guaranteed by the Fifth Amendment; and (3) violates the Foundation's right under the First Amendment to associate and promote causes through litigation, together with the equally fundamental First Amendment rights of its supporters, associated attorneys, and beneficiaries (i.e., the individual employees it assists).

Finally, the panel's decision conflicts with a decision of the Ninth Circuit not cited by Kidwell, i.e., *Fentron Industries, Inc. v. National Shopmen Pension Fund*, 674 F.2d 1300, 1305 (1982), which held that it would be a violation of the First Amendment right of association to deny class certification to employees

representing a class of pension fund participants because of the employer's alleged involvement in encouraging the employees to file suit.

If the second issue presented by Kidwell (Part III of the Petition) were decided properly, these consequential dangers to the cause-promoting legal aid community, and the consequential injuries to the Foundation, would *ipso facto* be substantially or wholly remedied.

## ARGUMENT

### A. BACKGROUND.

As noted in their Petition at ii and 4, this action was brought by four railroad employees, Kathryn A. Kidwell, Michael S. Coffman, Helen Eades, and Ramona J. Ellis against the Transportation Communications International Union; the Transportation Communications International Union, Con-Rail System Board of Adjustment No. 86; and the Transportation Communications International Union, Seaboard System Board of Adjustment No. 3 (hereafter referred to collectively as "TCIU") alleging, *inter alia*, violations of the Employees' First Amendment and statutory rights in an agency fee context under the Railway Labor Act. *The Foundation is not and never has been a party to this action.*

Milton L. Chappell has been the litigation representative of the Employees, i.e., their attorney, for the duration of the litigation. Petition at 11 n.14. *The Foundation is not a law firm, is not the representative/attorney of the Employees, and has never sought such status.*

In spite of the Foundation's obvious non-party and non-attorney/law firm status, the Fourth Circuit panel went beyond the scope of its authority and erroneously purported to rule on the question of the Foundation's status as a supposed "litigation representative" of the class or of the Employees. To support this extra-judicial ruling with respect to the Foundation, the panel

adopted an equally extra-judicial, putative holding from the Seventh Circuit in *Gilpin v. AFSCME*, 875 F.2d 1310, 1313 (7th Cir.), *cert. denied*, 493 U.S. 917 (1989), i.e., "the 'National Right to Work Foundation is not an adequate litigation representative' for those 'nonunion employees who . . . have no desire to ruin the union or impair its ability to represent them effectively . . . .' *Id.*" (Pet. App. at 43a-44a.)

In *Gilpin*, as well, the Foundation was *not* a party to the litigation. Also, not being a law firm, the Foundation never attempted to represent anyone in the litigation. Nonetheless, the Seventh Circuit Gilpin court took a number of gratuitous, extra-judicial and extra-record slaps at the Foundation. The Foundation challenged the Seventh Circuit's action by filing a Petition for Leave to Intervene and Petition for Writ of Certiorari with this Court. *National Right to Work Legal Defense & Educ. Found., Inc. v. AFSCME*, *cert. denied*, 493 U.S. 917 (1989).[2]

That effort failed when this Court denied certiorari; however, the Seventh Circuit could not render a valid judgment concerning the Foundation without jurisdiction over it and a case or controversy concerning it. The Seventh Circuit had neither; thus, the Seventh Circuit's opinion with respect to the Foundation is legally, constitutionally, and factually invalid. The Fourth Circuit panel was totally unjustified in relying upon it.[3]

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[2] One of the issues raised by the Foundation in its Petition was that, if this Court did not intercede to correct the Seventh Circuit's *Gilpin* decision, other courts might be induced erroneously to give it res judicata or collateral estoppel effect. That prediction has now come true with the Fourth Circuit's *Kidwell* decision. Now, in this case, is the time to correct the errors before they multiply like a virus.

[3] The Foundation attempted to apprise the Fourth Circuit panel of its error, but the Court stubbornly refused to become informed, choosing instead to deny the Foundation's Motion for Leave to File Brief *Amicus Curiae*. Order filed November 21, 1991, Appendix to this brief.

Factually, the extra-judicial decision-making of the Fourth Circuit panel with respect to the Foundation was just as defective as the *Gilpin* panel's. In this case, the *Employees* sought to be class representatives with *Milton L. Chappell* serving as their counsel.[4] *The Foundation never sought either status.*

In an attempt to mislead the district court, TCIU improperly injected the falsehood that "the plaintiffs are represented by the National Right to Work Legal Defense Foundation" and "the National Right to Work Legal Defense Foundation now seek[s] to represent a broad class."[5]

The Employees and their real counsel, *Milton L. Chappell*, immediately and unequivocally corrected this for the district court:

> Third, defendants state that "plaintiffs are . . . represented by the National Right to Work Legal Defense Foundation" and "the . . . Foundation now seek[s] to represent a broad class." . . . This is not correct. The Foundation is not a law firm and does not represent clients. It is a charitable legal aid organization which employs attorneys who *personally* represent individual employees with claims that their legal rights have been abrogated by abuses of compulsory unionism.[3] Plaintiffs are represented by Milton L. Chappell, Esquire,[4] not the Foundation. At all times Mr. Chappell exercises his independent, legal judgment in representing his clients, the plaintiffs.

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[4] Memorandum of Points and Authorities in Support of Motion to Maintain Class Action, District Court Record ("R.") 7 at 9-13.

[5] Defendants' Opposition to Plaintiffs' Motion to Maintain Class Action, R. 14 at 2-3, 5, 9, 12-13.

[3] The activities of the Foundation "are protected modes of association and expression under the first amendment."

[4] Mr. Chappell's qualifications and competency to conduct the litigation on behalf of all class members, which defendants do not challenge, are stated in Plaintiffs' Memorandum of Points and Authorities in Support of Motion to Maintain Class Action at 12-13 & n.4, dated December 17, 1985 . . . .

Plaintiffs' Reply Memorandum to Defendants' Opposition to Plaintiffs' Motion to Maintain Class Action, R. 16 at 3 (citations omitted).

A similar attempt to mislead the district court concerning the Foundation was made by TCIU in its Opposition to Plaintiffs' Motion to Alter or Amend Judgment (R. 62 at 8) and was rebutted to the satisfaction of the district court by the Employees in their Reply to Defendants' Opposition to Plaintiffs' Motion to Alter or Amend Judgment (R. 64 at 1) by reference to Plaintiffs' Reply Memorandum. just quoted (R. 16 at 3).

The district court clearly understood that it had no jurisdiction over the Foundation and that the Foundation was not a party to this litigation, did not represent any party, and did not seek to represent any class or party. A review of the district court's Opinion and Judgment (Pet. App. B & C) and its Memorandum and Order amending the Judgment (Pet. App. D & E) demonstrate this. There was not one word concerning the Foundation in any such capacity or capacities in the entire text of those documents.

It does not appear that TCIU attempted improperly to inject on appeal any issue with respect to the Foundation. The parties on appeal quite appropriately confined their discussion of the class issues to those related to the Employees, Kidwell, *et al.*, and their real counsel, Milton L. Chappell.

The Foundation, *amicus curiae* here, not being a party and not being the representative of any party, has not at any time been subject to the jurisdiction of either of the courts below. In spite of that total lack of jurisdiction, the Fourth Circuit panel *sua sponte* made an adverse determination as if the Foundation were before the court and were the representative of the Employees, to wit:

> The Seventh Circuit has cogently explained the dangers of class certification in a remarkably similar context:
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> > . . . Two distinct types of employees will decline to join the union representing their bargaining unit. The first is the employee who is hostile to unions on political or ideological grounds. The second is the employee who is happy to be represented by a union but won't pay any more for that representation than he is forced to. The two types have potentially divergent aims. The first wants to weaken and if possible destroy the union; the second, a free rider, wants merely to shift as much of the cost of representation as possible to other workers, i.e., union members. The "restitution" remedy sought by the National Right to Work Legal Defense Foundation, which represents the nine named plaintiffs, is consistent with — and only with — the aims of the first type of employee.

*Gilpin v. AFSCME, AFL-CIO*, 875 F.2d 1310, 1313 (7th Cir.), *cert. denied*, 493 U.S. 917, 110 S.Ct. 278, 107 L.Ed.2d 258 (1989). The court upheld the district court's denial of class certification adding that the "National Right to Work Foundation is not an adequate litigation representative" for those "nonunion employees who, while not wanting to pay more (and perhaps even wanting to pay less) than their 'fair share' fees, have no

> desire to ruin the union or impair its ability to represent them effectively . . . ." *Id.*
>
> We agree with the Seventh Circuit. The plaintiffs, once again represented by the National Right to Work Legal Defense Foundation, are not adequate representatives under Rule 23.

Pet. App. A at 43a-44a.

Until the Foundation first learned of the Fourth Circuit's decision, it had no awareness whatsoever that the panel might be: (1) mistakenly concluding that it had some sort of jurisdiction over the Foundation; (2) mistaking the Foundation for the Employees' counsel or for the representative of a class; and (3) harboring an adverse opinion of the Foundation and its First Amendment-protected, cause-promoting, legal aid activities.

The Foundation did not seek the district court's protection as a plaintiff or the Fourth Circuit's protection as an appellant. The Foundation was never served any process as a defendant or a witness. No motions of any kind were filed for or against the Foundation in either the district court or the Fourth Circuit. Neither court entered any kind of "show cause" order directed to the Foundation.[6]

In spite of its obvious lack of jurisdiction over the Foundation, and the lack of any notice to the Foundation and opportunity to be heard, the Fourth Circuit panel, nonetheless, erroneously determined the *utterly fictitious* issue that the Foundation

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[6] No such action was taken against the Employees' real counsel either, that is, Milton L. Chappell. If there were any bona fide question of the adequacy of the Employees' real litigation representative, that inquiry would have focused on Mr. Chappell's qualifications. A review of the record reveals that there was no contest over his qualifications, nor would any such contest have been valid. *See George v. Baltimore City Public Schools*, 117 F.R.D. 368 (D. Md. 1987).

is not an adequate "litigation representative" in class action litigation such as this.

The *Kidwell* decision, and the *Gilpin* decision on which it rests, have planted seeds of destruction for the cause-promoting, legal aid community's use of the class action device. They have created a "guilt-by-association" test to be applied to proposed class representatives, and they have opened up a wealth of discovery opportunities for defense counsel to probe into the ideological beliefs and associations of individuals who must rely on legal aid support to vindicate their constitutional and statutory rights.[7]

The Foundation, its supporters, and those employees it assists, all have a constitutional right to associate and to use litigation as a vehicle for First Amendment cause promotion. This is an issue which the Foundation has litigated, when the Foundation was a party and this matter was at issue. *UAW v. National Right to Work Legal Defense & Educ. Found., Inc.*, 781 F.2d 928 (D.C. Cir. 1986) (twelve-year case establishing that the Foundation is a bona fide, independent, legal aid organization).

The panel's decision unjustly jeopardizes the Foundation's ability to defend its reputation and to continue its legal aid program. Decisions are cited for res judicata or collateral estoppel effect, *Holmes v. United States*, 231 F. Supp. 971 (N.D. Ga. 1964) (court took judicial notice of prior litigation), *aff'd*, 353 F.2d 785 (5th Cir. 1965), and the Fourth Circuit has now been gulled into citing *Gilpin* in support of its extra-judicially conceived view of the Foundation. Ironically, TCIU (under its former

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[7] An inquiry into the ideological beliefs of dissenting employees, in the agency fee context, is itself unconstitutional. "To require greater specificity [than simple objection] would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 241 (1977) (note omitted).

name, Brotherhood of Railway, Airline and Steamship Clerks) was one of the losing plaintiffs in *UAW*, *see* 590 F.2d 1139, 1144 n.5 (D.C. Cir. 1978), *earlier proceedings*, and thus bound by that decision. Res judicata thus foreclosed TCIU from presenting a record to obtain the very decision the panel issued without one.

### B. THE FOURTH CIRCUIT PANEL ERRONEOUSLY ASSUMED JURISDICTION OVER THE FOUNDATION WITHOUT ANY CASE OR CONTROVERSY CONCERNING THE FOUNDATION.

The exercise of judicial power by the Federal courts depends on the existence of a case or controversy. U.S. Const., Art. III, § 2, cl. 1; *Preiser v. Newkirk*, 422 U.S. 395 (1975); *Powell v. McCormack*, 395 U.S. 486 (1969).

The record, both at the district court and at the court of appeals, is devoid of any claim against or on behalf of the Foundation. The Foundation has been a stranger to the issues raised by the parties in this action, and it has properly not sought to become a party to them. It merely helped the Employees by providing them with legal assistance. Thus, there was no claim or issue pending with respect to the Foundation for which the Fourth Circuit panel had jurisdiction to render an opinion. The panel's determination with respect to the Foundation clearly violates the case or controversy doctrine.

To make the situation worse, as a matter of concrete fact, the Foundation could never be the litigation representative of any party because it is not a lawyer or a law firm. It is a charitable, legal aid organization that provides financial support for litigation, underwriting the work of attorneys who themselves represent the employee-beneficiaries of the Foundation. *National Right to Work Legal Defense & Educ. Found., Inc. v. United States*, 487 F. Supp. 801 (E.D.N.C. 1979); *George v. Baltimore City Public Schools*, 117 F.R.D. 368 (D. Md. 1987). It is those attorneys who, upon motion in appropriate circumstances, seek to be the litigation representatives of class representatives. Mr. Chappell

did so in this litigation and, as noted above at note 6, there was no challenge to his qualifications.

The panel, by erroneously treating the Foundation as a litigant before it, without any "case or controversy" existing with respect to the Foundation, committed reversible error.

### C. THE FOURTH CIRCUIT PANEL DENIED THE FOUNDATION DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AMENDMENT.

The panel compounded its error by denying the Foundation the most basic elements of due process under the Fifth Amendment, as implemented by statute and the Federal Rules of Civil Procedure.

The Fifth Amendment provides, "No person shall . . . be deprived of life, liberty, or property, without due process of law." The absolute fundamentals of "due process of law" are jurisdiction, adequate notice, and a fair hearing. *United States v. Certain Parcels of Land*, 40 F. Supp. 436 (D. Md. 1941). A fundamental requirement of due process is the opportunity to be heard at a meaningful time in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

The Fourth Circuit may have had jurisdiction to hear the appeal in this case, 28 U.S.C. § 1291, but it had no jurisdiction over the Foundation. The Foundation was *not* a party to the litigation; nor did it seek to be. The Foundation was *not* the "legal representative" of any party; nor did it seek to be.

No notice of any kind was ever served or otherwise delivered to the Foundation alerting it to the fact that its interests might be affected, in any way, by the litigation. No process was served on the Foundation pursuant to Fed. R. Civ. P. 4; no papers were ever served on it pursuant to Fed. R. Civ. P. 5; and no subpoena was ever served on it pursuant to Fed. R. Civ. P. 45. Why the panel treated the Foundation as a "litigation representative"

remains a mystery. Obviously, the Foundation had no opportunity to be heard with respect to the panel's erroneous conclusion.

The injury inflicted on the Foundation by the panel's extrajudicial action involves rights protected by the Fifth Amendment Due Process clause. For example: the right to petition the government for redress of grievances through access to the courts, *In re N. C. Trading*, 586 F.2d 221 (C.C.P.A. 1978); and the protection of one's good name, reputation, honor, and integrity, *Old Dominion Dairy Products, Inc. v. Secretary of Defense*, 631 F.2d 953 (D.C. Cir. 1980).

The panel's decision is also a direct attack on the Foundation's right to provide, and employees' right to receive, legal aid, especially when class actions are involved. *See Fentron Indus., Inc. v. National Shopmen Pension Fund*, 674 F.2d 1300, 1305 (9th Cir. 1982). This is contrary to a litigated decision involving the Foundation and its attorneys, i.e., *George*, where the attorneys sought to represent members of a class, the attorneys' relationship with the Foundation was a matter of a fully developed record and proper adjudication, and the *attorneys* were found to be proper representatives of the class representatives.

### D. THE FOUNDATION'S FIRST AMENDMENT RIGHT TO ASSOCIATE WITH ITS SUPPORTERS AND THE EMPLOYEES IT ASSISTS FOR THE PROMOTION OF CAUSES HAS BEEN VIOLATED BY THE PANEL'S DECISION, AND THE PANEL'S DECISION THREATENS THE ENTIRE CAUSE-PROMOTING LEGAL AID COMMUNITY'S USE OF CLASS ACTION LITIGATION.

The Foundation's provision of legal assistance to employees is a First Amendment-protected activity. *UAW v. National Right to Work Legal Defense & Educ. Found., Inc.*, 590 F.2d 1139, 1147

(D.C. Cir. 1978), *further proceedings*, 584 F. Supp. 1219 (D.D.C. 1984), *aff'd*, 781 F.2d 928 (D.C. Cir. 1986).

In *UAW*, although for more than a decade twelve large unions were given repeated and substantial opportunities to uncover specific facts regarding their distorted view of the Foundation and its litigation program, they were unable to establish a single fact that "even remotely suggest[ed] that . . . the Foundation . . . cause[d] union members to bring harassing suits against labor organizations or otherwise to disrupt union harmony." *UAW*, 781 F.2d at 955; *accord id.*, 584 F. Supp. at 1224. The courts have repeatedly held that the Foundation is a legitimate legal aid organization like the NAACP Legal Defense Foundation, the American Civil Liberties Union, and the Legal Aid Society, to mention a few.

The Foundation is a nonprofit, charitable organization formed in accordance with 26 U.S.C. § 501(c)(3) as a vehicle for people to associate in order to foster their principled beliefs, *inter alia*, that compulsory unionism as an institution gives rise to abuses and injustices visited upon employees, and these employees should be provided legal aid to see those injustices corrected. The pertinent parts of the Foundation's Articles of Incorporation are quoted in *National Right to Work Legal Defense & Education Foundation, Inc. v. United States*, 487 F. Supp. 801, 802-03 (E.D.N.C. 1979), a tax exemption case in which the Foundation's purposes and activities were directly at issue. In describing the work of the Foundation in that case, the district court noted:

> [R]eading of the pertinent cases reveals that the courts have rarely articulated a fundamental right with more sweeping eloquence and affection than they have the right to work. . . .
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> Like all fundamental rights, however, the right to work is not absolute, for it is subject to the limitations of compelling state interests. . . . For example, a compulsory union arrangement can exist if permitted by federal and state statute; but the same arrangement

> cannot condition membership upon forced contributions going to political causes with which the contributor does not agree. It is with this tension between the right to work and the competing state interest the [Foundation's] litigation is primarily concerned. The sponsored litigation deals with those instances in which, in the judgment of the plaintiffs, a compulsory union arrangement oversteps the boundaries drawn by the right to work. . . .
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> . . . .
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> The defense of each citizen's right to work under the First, Fifth and Fourteenth Amendments is a noble objective. The public has a paramount interest in insuring that compulsory union arrangements do not unnecessarily impinge upon each worker's freedom of thought, association or speech. Litigation is an appropriate vehicle for an organization to accomplish that objective.

*Id.* at 805-06, 807 (citations omitted).

If the Fourth Circuit panel's preconceived adverse reaction to the Foundation's provision of legal aid is acceptable, then for the same reasons, African Americans helped by the NAACP, consumers represented by Ralph Nader, individuals helped by the ACLU, and even employees helped by labor unions will all see their constitutional right to advance their causes jeopardized in future federal court litigation.

This Court, however, has made it clear that such a result is unconstitutional. In *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1, 5-6, 7 (1964) (citations omitted), the Court said:

> It cannot be seriously doubted that the First Amendment's guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them

> . . . , statutory rights which would be vain and futile if the workers could not talk together freely as to the best course to follow.
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> . . . .
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> Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries, and for them to associate together to help one another to preserve and enforce rights granted them under federal laws cannot be condemned . . . . The right to petition the courts cannot be so handicapped.

Furthermore, "the exercise . . . of First Amendment rights to enforce constitutional rights through litigation, *as a matter of law, cannot be deemed malicious.*" *NAACP v. Button*, 371 U.S. 415, 440 (1963) (emphasis added). That this principle applies to the Foundation, and is not restricted to the constitutional rights against racial discrimination, is clear by the concluding language of the Court, *id.* at 444-45:

> That the petitioner happens to be engaged in activities of expression and association on behalf of the rights of Negro children to equal opportunity is constitutionally irrelevant to the ground of our decision. . . . For the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered.

The Fourth Circuit panel's decision in this case is fraught with constitutional considerations. First, the Employees raised First Amendment claims. Second, the Foundation, its contributors, and staff are engaged in First Amendment-protected activities when they support this type of litigation. Third, Milton Chappell is engaged in First Amendment activity when he chooses to associate with other attorneys and the Foundation for the purpose of representing the Employees. *In re Primus*, 436

U.S. 412, 426 (1978); *Button*, 371 U.S. at 428-31; *see also UAW*, 590 F.2d at 1147-48; *United Mine Workers, District 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 222-23 (1967).

Certainly, the panel would not contend, as the State of Virginia and other segregationists did in regard to the NAACP in the 1950's and 1960's, that the NAACP was "evil" because its efforts to vindicate the constitutional rights of African Americans thwarted the then politically dominate racist community of Virginia, which favored denying those rights. This Court has said:

> We cannot close our eyes to the fact that the militant Negro civil rights movement has engendered the intense resentment and opposition of the politically dominant white community of Virginia; litigation assisted by the NAACP has been bitterly fought. . . . The sheer mass of such . . . litigation is an indication of the intensity of the struggle. . . . Lawsuits attacking racial discrimination, at least in Virginia, are neither very profitable nor very popular.

*Button*, 371 U.S. at 435 & n.16 (additional note omitted), 443.

If the Employees were being sentenced as convicted felons, references to their association with the Foundation during sentencing (assuming the panel's jaundiced view of the Foundation has any validity) would constitute a violation of their First Amendment rights. *See Dawson v. Delaware*, ___ U.S. ___, 1992 WL 40781 (U.S. Mar. 9, 1992) (No. 90-6704). *A fortiori* it must be a violation of the Employees' First Amendment rights (and the Foundation's) for the panel to apply its guilt-by-association rule to the Employees in deciding the class action issue.

Failure to correct the Fourth Circuit panel's decision in this case, which applies the Seventh Circuit's ideological, guilt-by-association rule to a new group of proposed class representatives, would permit further multiplication of the *Gilpin* error and allow litigation opponents of other Foundation beneficiaries to contend around the country that the Foundation is "evil" because of its

efforts to vindicate the constitutional and statutory rights of employees abused by compulsory unionism arrangements.

The effect on other cause-promoting legal aid organizations will be similarly destructive. From now on, every time the NAACP, the ACLU, or any of the many other legal aid advocacy organizations sponsor class action litigation, they and their beneficiaries will be subject to attack in the *Gilpin-Kidwell* manner. The ideological beliefs of the legal aid organization, the proposed class representatives, and the class members will be subject to inquiry and public evaluation. The class action device in such legal aid cases will be seriously damaged.

In addition, this damage may occur, as it has here, in the silence of court chambers, without the legal aid organization being a party to the lawsuit or being alerted through any legal process to the secret machinations of the Court.

### E. THE FOURTH CIRCUIT PANEL'S DECISION CONFLICTS WITH A DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN ADDITION TO THE AUTHORITIES CITED BY THE EMPLOYEES.

In Part III, B of their Petition, the Employees cite several authorities demonstrating that the panel's class certification decision conflicts with several decisions of other United States courts of appeals. There is additional conflicting authority.

The Ninth Circuit, in *Fentron Industries, Inc. v. National Shopmen Pension Fund*, 674 F.2d 1300, 1305 (1982), held that it would be a violation of the First Amendment right of association to deny class certification to employees representing a class of pension fund participants because of the employer's alleged involvement in encouraging the employees to file suit.

*Fentron* is squarely based on the First Amendment right to associate for purposes of litigation and on decisions of this Court vindicating that right, i.e., *In re Primus*, 436 U.S. 412 (1978);

*United Transp. Union v. State Bar*, 401 U.S. 576 (1971). *Fentron*, 674 F.2d at 1305. The Fourth Circuit's *Kidwell* decision, on the other hand, ignores and emasculates that right.

Thus, the Court should grant Kidwell's Petition in order to resolve the conflicts between the circuits created by the Fourth Circuit's decision.

## CONCLUSION

For the foregoing reasons, the Foundation urges the Court to grant the Petition and issue a writ of certiorari.

Respectfully submitted,

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# APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
November 21, 1991

No. 90-2511
CA-85-3804

KATHRYN A. KIDWELL; MICHAEL S. COFFMAN; HELEN EADES; RAMONA J. ELLIS

Plaintiffs - Appellees

v.

TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION; TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION, Con-Rail System Board of Adjustment No. 86; TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION, Seaboard System Board of Adjustment No. 3

Defendants - Appellants

No. 90-2512
CA-85-3804-PN

KATHRYN A. KIDWELL; MICHAEL S. COFFMAN; HELEN EADES; RAMONA J. ELLIS

Plaintiffs - Appellants

v.

TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION; TRANSPORTATION COMMUNICATIONS

INTERNATIONAL UNION, Con-Rail System Board of Adjustment No. 86; TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION, Seaboard System Board of Adjustment No. 3

Defendants - Appellees

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ORDER

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The National Right to Work Legal Defense and Education Foundation, Inc., has filed a motion for leave to file brief amicus curiae in support of appellees/cross-appellants' petition for rehearing with suggestion for rehearing in banc. The Court denies the motion.

FOR THE COURT — BY DIRECTION

JOHN M. GREACEN
CLERK